

IN THE SUPREME COURT OF THE STATE OF ALASKA

RESOURCE DEVELOPMENT COUNCIL)
FOR ALASKA, INC.; ALASKA TRUCKING)
ASSOCIATION, INC.; ALASKA MINERS)
ASSOCIATION, INC.; ASSOCIATED)
GENERAL CONTRACTORS OF ALASKA;)
ALASKA CHAMBER; and ALASKA)
SUPPORT INDUSTRY ALLIANCE,)

Appellants and Cross-Appellees,)

v.)

KEVIN MEYER, in his official capacity,)
as Lt. Governor of the State of Alaska;)
GAIL FENUMIAI, in her capacity as Director)
of the Alaska Division of Elections; the)
STATE OF ALASKA, DIVISION OF)
ELECTIONS,)

Appellees,)

v.)

VOTE YES FOR ALASKA'S FAIR SHARE,)

Appellee and Cross-Appellant.)

Trial Court Case No. 3AN-20-05901CI

Supreme Court No. S-17834

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE THOMAS A. MATTHEWS, PRESIDING

**APPELLANTS' EXCERPT OF RECORD
VOLUME 1 OF 1**

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TABLE OF CONTENTS

Complaint for Injunctive and Declaratory Relief (April 10, 2020)	1-9
Motion to Characterize Case as Non-Routine and to Set Expedited Discovery and August 2020 Trial Date (April 17, 2020)	10-18
Exhibit A – Lieutenant Governor Kevin Meyer letter to Robin O. Brena Re: 19OGTX – Fair Share Initiative (March 17, 2020)	19-21
State Defendants’ Response to Plaintiffs’ Motion to Characterize Case as Non-Routine and Cross-Motion to Dismiss Pursuant to Alaska Civil Rule 12(b)(6) (April 30, 2020)	22-35
Answer of Vote Yes for Alaska’s Fair Share (May 4, 2020)	36-42
Opposition to Motion to Dismiss and Reply in Support of Motion to Characterize Case as Non-Routine (May 12, 2020).....	43-73
Defendant Vote Yes for Alaska’s Fair Share’s Motion to Dismiss (May 18, 2020)	74-98
Exhibit 1 – Senate Judiciary Committee Meeting transcript excerpt; tr. pp. 18-21 (March 18, 1998)	99-101
Exhibit 2 – House Finance Committee Meeting transcript excerpt; tr. pp. 74-77 (March 8, 1998).....	102-104
State’s Reply in Support of Cross-Motion to Dismiss (May 19, 2020)	105-117
Plaintiffs’ Opposition to Defendant Vote Yes for Alaska’s Fair Share’s Motion for Judgment on the Pleadings and Cross-Motion for Partial Summary Judgment (June 2, 2020).....	118-151
Exhibit A – Senate Bill No. 313, Twentieth Legislature-Second Session (February 2, 1998)	152-155
Exhibit B – Senate Bill No. 313 (FIN) (May 1998).....	156-159
Exhibit C – House Bill No. 36 (January 20, 2009)	160-164
Exhibit D – SCS CSSSHB36 (JUD) (2010).....	165-174

Fair Share’s Reply in Support of Its Motion to Dismiss (June 9, 2020)	175-186
Exhibit 1 – Senate Judiciary Committee Meeting transcript excerpt; tr. pp. 18-21 (March 18, 1998)	187-189
Exhibit 2 – House Finance Committee Meeting transcript excerpt; tr. pp. 74-77 (March 8, 1998)	190-192
Exhibit 3 – House Finance Committee Meeting transcript excerpt; tr. pp. 78-81 (March 8, 1998)	193-195
Fair Share’s Opposition to Plaintiffs’ Cross-Motion for Partial Summary Judgment (June 17, 2020)	196-206
Reply in Support of Plaintiffs’ Cross-Motion for Partial Summary Judgment (June 26, 2020)	207-220
Plaintiffs’ Motion for Summary Judgment (July 6, 2020)	221-223
Plaintiffs’ Memorandum in Support of Motion for Summary Judgment with Exhibits A-K (July 6, 2020) (SEALED)	224
Fair Share’s Opposition to Plaintiffs’ Motion for Summary Judgment (July 10, 2020) (SEALED)	225
Reply in Support of Plaintiffs’ Motion for Summary Judgment (July 14, 2020) (SEALED)	226
Order re Pending Motions to Dismiss and Motions for Summary Judgment (July 16, 2020)	227-256
Final Judgment (July 17, 2020)	257

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FILED
STATE OF ALASKA
THIRD DISTRICT

THIRD JUDICIAL DISTRICT AT ANCHORAGE

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GAIL FENUMIAI, in her capacity as Director)
of the Alaska Division of Elections; the)
STATE OF ALASKA, DIVISION OF)
ELECTIONS; and VOTE YES FOR)
ALASKA'S FAIR SHARE,)

Defendants.)

CLERK OF THE TRIAL COURTS

BY _____
DEPUTY CLERK

Case No. 3AN-20- 5901 CI

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

PARTIES

1. Plaintiff Resource Development Council For Alaska, Inc. ("RDC") is an Alaska nonprofit corporation that is a statewide business association comprised of individuals and companies from Alaska's oil and gas, mining, forest products, tourism and fisheries industries. RDC's membership includes Alaska Native Corporations, local Alaska communities, organized labor, and industry support firms. RDC's purpose is to

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encourage a strong, diversified private sector in Alaska and expand the state's economic base through the responsible development of Alaska's natural resources.

2. Plaintiff Alaska Trucking Association, Inc. is an Alaska nonprofit corporation comprised of members of Alaska's trucking community, as well as companies that support, produce, manufacture or supply services to the trucking industry. The Alaska Trucking Association has advocated for the interests of active, for hire, private, and specialized trucking companies in the Alaska transportation industry, as well as companies that support the trucking industry for over 60 years.

3. Plaintiff Alaska Miners Association, Inc. is an Alaska nonprofit corporation comprised of entities and individuals involved in mineral production in the State of Alaska. Alaska Miners Association, Inc. encourages and supports responsible mineral production in Alaska through, among other things, monitoring and participating in the political process to ensure that lands remain available for responsible mineral exploration and development and that mineral production remains a viable industry in Alaska.

4. Plaintiff Associated General Contractors of Alaska is an Alaska nonprofit corporation comprised of members that are actively involved in residential, institutional and commercial building, industrial, infrastructure and heavy construction in Alaska, as well as those that support the Alaska construction industry. Among other things, Associated General Contractors of Alaska advocates on behalf of its members and the Alaska construction industry for responsible public policy that promotes construction in Alaska.

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5. Plaintiff Alaska Chamber is an Alaskan member-based group that has been the voice of the Alaska business community since its founding in 1953. The Alaska Chamber's membership includes, among others, individual Alaskans, Alaska Native Corporations, oil and gas companies, trucking companies, banks, mining entities, and tourism companies.

6. Plaintiff Alaska Support Industry Alliance is an Alaska nonprofit corporation comprised of members of individuals and entities that support safe, environmentally responsible development of Alaska's oil, gas and mineral resources for the benefit of all Alaskans. Alaska Support Industry Alliance advocates on behalf of its members for public policy that supports the responsible development of Alaska's natural resources and the jobs that come with responsible development.

7. Defendant Kevin Meyer is the lieutenant governor of the State of Alaska and is sued solely in his official capacity with regard to the discharge of his duties under Article XI of the Alaska Constitution and Title 15, Chapter 45 of the Alaska Statutes.

8. Defendant Gail Fenumiai ("Director Fenumiai") is the Director of the Division of Elections and is sued solely in her official capacity with regard to the discharge of her duties under Article XI of the Alaska Constitution and Title 15, Chapter 45 of the Alaska Statutes.

9. Defendant State of Alaska, Division of Elections (the "Division") is the agency charged with, in conjunction with the Lieutenant Governor, administering Alaska ballot initiatives.

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10. Defendant Vote Yes For Alaska's Fair Share is the official ballot group for the state-wide initiative entitled "An Act changing the oil and gas production tax for certain fields, units, and nonunitized reservoirs on the North Slope." Hereinafter this initiative is referred to as "19OGTX."

FACTS

11. Alaska law prohibits payment in excess of \$1 per signature gatherer. The same statute requires that signature gatherers must be Alaska citizens. These reasonable requirements were intended to protect Alaska's ballot initiative process from the corrupting influence of outside interests and to assure that ballot initiatives have the support of Alaskans.

12. On or about October 23, 2019, the Division of Elections issued printed petition booklets to the sponsors of the 19OGTX initiative.

13. On or before October 31, 2019, Vote Yes for Alaska's Fair Share hired Texas Petition Strategies of Buda, Texas, to collect the requisite number of signatures from Alaska voters to put 19OGTX on the state-wide ballot.

14. On or before January 16, 2020, Vote Yes for Alaska's Fair Share hired the Dallas, Texas office of a national professional signature gathering company based in Las Vegas, Nevada, Advanced Micro Targeting, Inc. ("Advanced Micro Targeting"), to collect the requisite number of signatures from Alaska voters to put 19OGTX on the state-wide ballot.

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15. The Division of Elections received in total 786 signed petition booklets for signatures gathered in support of putting 19OGTX on the ballot.

16. Of the total 786 petition booklets, zero (0) of them were submitted by individuals stating they were paid by Texas Petition Strategies to collect signatures.

17. Of the total 786 petition booklets, 544 of them were submitted by circulators stating they were paid by Advanced Micro Targeting to collect signatures.

18. As required by Alaska law, each of these circulators submitted a "Certification Affidavit" along with each petition booklet.

19. As required by Alaska law, each individual working for Advanced Micro Targeting swore that he or she had not "entered into an agreement with a person or organization in violation of AS 15.45.110(c)."

20. AS 15.45.110(c) provides in full: "A circulator may not receive payment or agree to receive payment that is greater than \$1 a signature, and a person or an organization may not pay or agree to pay an amount that is greater than \$1 a signature, for the collection of signatures on a petition."

21. According to public filings, Vote Yes For Alaska's Fair Share paid \$130,000 to Texas Petition Strategies and \$72,500 to Advanced Micro Targeting.

22. Advanced Micro Targeting offered to pay an amount that is greater than \$1 per signature for the collection of signatures on a petition by advertising that it would pay signature gatherers \$3,500 - \$4,000 per month plus bonus, and that it expected 80-100 signatures per day, six days per week in return for such compensation.

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23. On information and belief, Advanced Micro Targeting and/or Texas Petition Strategies paid to fly nonresident professional signature gatherers to Alaska, and also provided meals and lodging as additional compensation.

24. Upon information and belief, signature gatherers hired by Texas Petition Strategies to gather signatures on the 19OGTX petitions were subsequently hired and paid by Advanced Micro Targeting for the collection of signatures on the 19OGTX petitions. Upon information and belief, Texas Petition Strategies and/or Advanced Micro Targeting paid individuals in excess of \$1 a signature for the collection of signatures on the 19OGTX petitions.

25. Many of the circulators who stated they were paid by Advanced Micro Targeting who submitted the 19OGTX booklets falsely swore compliance with AS 15.45.110(c), as they were paid in excess of \$1 a signature for the collection of signatures on the 19OGTX petitions.

COUNT I: DECLARATORY JUDGMENT
(Violation of AS 15.45.110(c) and AS 15.45.130)

26. Paragraphs 1-25 are herein incorporated.

27. AS 15.45.110(c) prohibits anyone from paying petition circulators in excess of \$1 a signature for the collection of signatures on petition booklets.

28. AS 15.45.130 requires each person who personally circulated a petition booklet to certify by affidavit swearing that the circulator, among other things, did not enter into an agreement that violated AS 15.45.110(c) or receive payment in excess of \$1 per signature.

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29. Pursuant to AS 15.45.130, each petition booklet must be certified by an affidavit of the circulator and "the lieutenant governor may not count subscriptions on petitions not properly certified at the time of filing or corrected before the subscriptions are counted."

30. A petition booklet supported by a circulator's false affidavit is not "properly certified" under AS 15.45.130.

31. Many of the circulator affidavits submitted with the 19OGTX petition booklets by the individuals who stated they were paid by Advanced Micro Targeting are false, and the petitions supported by those affidavits are not properly certified, because these individuals were paid in excess of \$1 per signature for the collection of signatures on the 19OGTX petitions.

32. Plaintiffs are entitled to a declaration that the 19OGTX petition booklets that are supported by false circulator affidavits have not been properly certified under AS 15.45.130 and that the signatures in those booklets may not be counted.

COUNT II: INJUNCTIVE RELIEF
(Invalidation of Offending Petition Booklets)

33. Paragraphs 1-32 are herein incorporated.

34. AS 15.45.130 provides, in relevant part, that in "determining the sufficiency of the petition, the lieutenant governor may not count subscriptions on petitions not properly certified at the time of filing or corrected before the subscriptions are counted."

35. Many of the affidavits accompanying the 544 petition booklets by the individuals working for Advanced Micro Targeting to circulate petitions in support of

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19OGTX are false, and therefore not properly certified, because these individuals were paid in excess of \$1 per signature for the collection of signatures on the 19OGTX petitions.

36. The Court must enter an order that Lt. Governor Meyer must invalidate those petition booklets and all subscriptions contained within those booklets as not properly certified.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief as follows:

1. For a declaration from the Court that Alaska law requires the invalidation of all signatures contained in petition booklets submitted by the individuals paid in excess of \$1 per signature to collect signatures in support of 19OGTX because those petitions were submitted with false petition circulator affidavits.

2. For a declaration that the Lieutenant Governor and the Division of Elections may not count signatures contained in the petition booklets submitted by the individuals paid in excess of \$1 per signature to collect signatures in support of 19OGTX because those petitions were submitted with false petition circulator affidavits.

3. For a declaration that, in accordance with AS 15.45.130, the Lieutenant Governor may not count the signatures contained in the petition booklets that were falsely sworn to and not properly certified.

4. For a declaration that Vote Yes For Alaska's Fair Share violated AS 15.45.110(c) by effectively paying or agreeing to pay an amount that is greater than \$1

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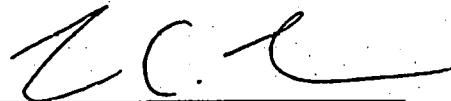
per signature for the collection of signatures and that it otherwise failed to file a petition meeting the requirements of AS 15.45.140.

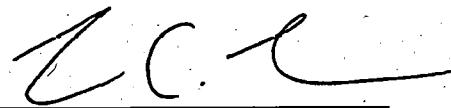
5. For entry of an injunction requiring the Lieutenant Governor and the Division of Elections to invalidate 19OGTX petition booklets not properly certified because they were submitted with false petition circulator affidavits and prohibiting the Lieutenant Governor and the Division of Elections from counting the signatures contained in those petition booklets.

6. For other and further relief as the court deems just and equitable.

DATED at Anchorage, Alaska this 10th day of April, 2020.

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

RESOURCE DEVELOPMENT COUNCIL)
FOR ALASKA, INC.; ALASKA TRUCKING)
ASSOCIATION, INC.; ALASKA MINERS)
ASSOCIATION, INC.; ASSOCIATED)
GENERAL CONTRACTORS OF ALASKA;)
ALASKA CHAMBER; ALASKA SUPPORT)
INDUSTRY ALLIANCE,)

Plaintiffs,)

v.)

KEVIN MEYER, in his official capacity,)
as Lt. Governor of the State of Alaska;)
GAIL FENUMIAI, in her capacity as Director)
of the Alaska Division of Elections; the)
STATE OF ALASKA, DIVISION OF)
ELECTIONS; and VOTE YES FOR)
ALASKA'S FAIR SHARE)

Defendants.)

Case No. 3AN-20-05901CI

FILED in the TRIAL COURTS
STATE OF ALASKA, THIRD DISTRICT

APR 17 2020

Clerk of the Trial Courts
By _____ Deputy

**MOTION TO CHARACTERIZE CASE AS NON-ROUTINE AND TO SET
EXPEDITED DISCOVERY AND AUGUST 2020 TRIAL DATE**

I. INTRODUCTION

Plaintiffs Resource Development Council for Alaska, Inc.; Alaska Trucking Association Inc.; Alaska Miners Association, Inc.; Associated General Contractors of Alaska; Alaska Chamber; and Alaska Support Industry Alliance (collectively "Plaintiffs")

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hereby move the Court, in accordance with the Third Judicial District's Uniform Pretrial Order,¹ to characterize this case as "non-routine," and to set an expedited timeline for discovery and an August 2020 trial date. Expedited discovery and an August 2020 trial date are necessary in this matter to ensure that Plaintiffs' challenges to the ballot initiative 19OGTX are decided before ballots are printed for statewide elections set for November 3, 2020.

Plaintiffs are mindful of the current public health crisis. This motion does not seek any immediate hearings or otherwise to interfere with current stay-at-home orders. However, some immediate action is required by this Court in order to be able to resolve this case by late-August, prior to printing of ballots that is likely to occur in September.

II. DISCUSSION

This case is about whether many of the petition circulators who collected signatures in support of the 19OGTX initiative submitted false affidavits that they did not enter into agreements to receive more than \$1 per signature for the collection of signatures. The evidence will show that the majority of signature gatherers for the Fair Share effort were offered payment far in excess of the statutory limit on circulator payment in AS 15.45.110(c). Because signatures must be "properly certified," and a false certification is not a "proper" one, many of the signatures must be invalidated.

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¹ Administrative Order 3A0-03-04 (Amended), *In re Uniform Pretrial Order* (Feb. 2003).

A. Plaintiffs Have Filed this Motion Before Defendants Have Answered the Complaint because Waiting for Them to Answer the Complaint Will Leave the Court with Even Less Time to Consider the Merits of this Matter.

Plaintiffs filed this case on April 10, 2020, and have served the Defendants by certified mail.² Under Civil Rule 12(a), the government defendants (Kevin Meyer, Gail Fenumiai, and State of Alaska Division of Elections) have 40 days from service to answer the complaint and the ballot group defendant (Vote Yes for Alaska's Fair Share) has 20 days to answer. While Plaintiffs would typically wait for these defendants to answer before filing this motion, there is simply not enough time to await those answers.

On March 17, 2020, Lieutenant Governor Kevin Meyer issued his determination that the petition was “properly filed” and met all requirements to be placed on the ballot.³ Part of the lieutenant governor's determination was that the circulators who collected the signatures (subscriptions) to the petitions had submitted truthful affidavits required by Alaska statute. Under AS 15.45.130, “the lieutenant governor may not count subscriptions on petitions not properly certified at the time of the filing or corrected before the subscriptions are counted.” Certification requires each circulator to submit a truthful affidavit that states, among other things, that he or she had not received or agreed to receive “payment that is greater than \$1 a signature[.]”⁴ Plaintiffs had 30 days from March 17 to

² See Rule 4(d)(7) and 4(h); Declaration of Counsel Matt Singer, ¶ 4 (April 17, 2020).

³ See Letter from Lt. Governor Meyer to R. Brena (March 17, 2020), attached as **Exhibit A**.

⁴ AS 15.45.110(c). AS 15.45.130(6) requires a circulator to swear under oath that he or she “has not entered into an agreement with a person or organization in violation of AS 15.45.110(c). AS 15.45.110(c), in turn, states “A circulator may not receive payment or agree to receive payment

file an action in superior court to challenge the lieutenant governor's determination that many of the circulator affidavits stating circulators had not received or agreed to receive payment greater than \$1 a signature to challenge in superior court.⁵ Plaintiffs met this tight statute of limitations and filed this lawsuit on April 10, 2020.

Plaintiffs have only three and half months remaining to conduct discovery and to submit evidence to this Court that many of the circulator affidavits submitted in support of 19OGTX were false. The Court will then have to decide prior to the printing of ballots whether this intentional evasion of Alaska law requires invalidating signatures. Plaintiffs' counsel understands from extensive prior experience on ballot initiative work that the State of Alaska has historically printed statewide ballots in early September to ensure the ballots are completed and distributed by election day on the first Tuesday following the first Monday in November (this election year, November 3, 2020).⁶ This three and a half month timeline necessitates that this Court treat this case as non-routine, to permit early discovery, and to set a trial in August 2020.

B. A Circulator's Submission of a False Affidavit Renders the Signatures Contained in that Circulator's Petition Booklet Invalid. Over Two-Thirds of the Petition Booklets at Issue in this Lawsuit are Potentially Invalid because of False Circulator Affidavits.

The allegations in Plaintiffs' complaint show why expedited proceedings in this

that is greater than \$1 a signature, and a person or an organization may not pay or agree to pay an amount that is greater than \$1 a signature, for the collection of signatures on a petition."

⁵ AS 15.45.240.

⁶ See Singer Decl., ¶ 5.

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matter are necessary. The Division of Elections received 786 signed petition booklets for signatures gathered in support of putting 19OGTX on the ballot.⁷ Of those booklets, 69%, or 544 booklets, were submitted by circulators stating they were paid by Advanced Micro Targeting, Inc. ("Advanced Micro Targeting"), a professional signature gathering company based in Las Vegas Nevada.⁸ There is strong evidence that those circulators were offered pay and indeed were paid in excess of \$1 per signature for the gathering of signatures for petition booklets.⁹ These circulators submitted false affidavits swearing that they had not been paid in excess of \$1 per signature as prohibited by AS 15.45.110(c) and AS 15.45.130(6).

The legal remedy for a circulator's submission of a false affidavit in support of the signatures he or she gathered is the invalidation of those collected signatures. While this is an issue of first impression in Alaska, other courts have held that petition circulators' false affidavits invalidate all the signatures in that petition.¹⁰ These cases emphasize that a circulator's false affidavit undermines the integrity of the signatures that circulator has

⁷ Plaintiffs Complaint, ¶ 15 (Apr. 10, 2020).

⁸ *Id.*, ¶¶ 14, 17.

⁹ *Id.*, ¶ 22.

¹⁰ See e.g. *Zaiser v. Jaeger*, 822 N.W.2d 472, 480 (N.D. 2012); *Brousseau v. Fitzgerald*, 675 P.2d 713, 715–16 (Ariz. 1984); *Sturdy v. Hall*, 143 S.W.2d 547, 550–52 (Ark. 1940); *Citizens Comm. v. District of Columbia Bd. of Elections and Ethics*, 860 A.2d 813, 816–17 (D.C. 2004); *Montanans for Justice v. State ex rel. McGrath*, 146 P.3d 759, 777 (Mont. 2006); *Maine Taxpayers Action Network v. Secretary of State*, 795 A.2d 75, 82 (Maine 2002); *McCaskey v. Kirchoff*, 152 A.2d 140, 142–43 (N.J. Super. Ct. App. Div. 1959); *In re Glazier*, 378 A.2d 314, 315–16 (Pa. 1977); *State ex rel. Gongwer v. Graves*, 107 N.E. 1018, 1022 (Ohio 1913).

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gathered, and that invalidation of all signatures is the appropriate remedy to ensure compliance in the future and the legality of the petition at issue. As the Arizona Supreme Court explained:

Defects either in circulation or signatures deal with matters of form and procedure, but the filing of a false affidavit by a circulator is a much more serious matter involving more than a technicality. The legislature has sought to protect the process by providing for some safeguards in the way nomination signatures are obtained and verified. Fraud in the certification destroys the safeguards unless there are strong sanctions for such conduct such as voiding of petitions with false certifications.¹¹

That is the precise issue in this lawsuit: whether the circulators who stated they were paid by Advanced Micro Targeting falsely swore that they had not agreed to receive or actually received payment in excess of the statutory limit.¹²

If Plaintiffs show that 69% percent of petition booklets (544 booklets) were supported by false circulator affidavits, all of the signatures in those booklets are invalid and 19OGTX will lack the requisite number of signatures under AS 15.45.140 to be on the

¹¹ *Brousseau*, 675 P.2d at 715.

¹² As noted above, the proper remedy for a false circulator affidavit is an issue of first impression in Alaska. The closest the Alaska Supreme Court has come to analyzing the proper remedy for false circulator affidavits is its decision in *North West Cruiseship Association of Alaska, Inc. v. State of Alaska et al.*, 145 P.3d 573 (Alaska 2006). But, that case **did not** involve false circulator affidavits. Rather, that case involved whether individual signatures within a petition booklet should be invalidated because they did not include all of the necessary information (such as the date the person was signing the petition and subscriber addresses) and whether the circulator's failure to provide information in the petition booklets for subscribers to review (such as who was paying the circulator listed on each page of the petition booklet) should invalidate the specific signatures that did not include the necessary information or were on pages without the proper circulator information. *North West Cruiseship Assn*, 145 P.3d at 582-589. This case, on the other hand, involves what is the appropriate remedy when a circulator submits a false affidavit in support of a petition booklet.

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November 3, 2020 statewide ballot. An expedited discovery process and an August 2020 trial is necessary to ensure that this dispute is resolved on the merits and an invalid initiative supported by false circulator affidavits is not on this fall's statewide ballot.

C. To Facilitate Resolution of Plaintiffs' Claims on the Merits, this Court Should Characterize this Case as "Non-Routine" and Set Early Discovery and Trial for August 2020.

The Third Judicial District's Uniform Pretrial Order requires that this Court characterize this civil case as either "Routine" or "Non-Routine."¹³ If this matter is designated as "routine," then standard pretrial deadlines are set for motions practice and discovery to bring the case to trial approximately 12-14 months from when the case was filed. For instance, if the case is designated routine, "[e]ach party must file and serve a preliminary witness list **22 weeks** prior to trial."¹⁴ Given there is only three and a half months until the State prints ballots for the general election, this case should be designated "Non-Routine" so that truncated pretrial deadlines and an August 2020 trial can be set.

Paragraph E. of the Third Judicial District Uniform Pretrial Order states:

The requirements and deadlines for Non-Routine cases may vary from the Routine Pretrial Order as the needs of the case may require in the discretion of the court. A Non-Routine Pretrial Order shall be issued and state, with specificity, the particular variations from the Routine Pretrial Order authorized. Except as specified in the Non-Routine Pretrial Order, the requirements and deadlines for Routine cases, as set out in the original Routine Pretrial Order, shall apply.

¹³ Paragraph B of the Uniform Pretrial Order (Feb. 2003).

¹⁴ Paragraph D.3. of the Uniform Pretrial Order.

Plaintiffs ask the Court to characterize this case as Non-Routine and set the following pretrial deadlines:

Pretrial Task	Deadline
Amendment of Pleadings and Addition of Parties	15 days from distribution of Court's Non-Routine Pretrial Order
Preliminary Witness List	30 days from distribution of Court's Non-Routine Pretrial Order
Final Witness List	14 days before start of trial
Expert Witnesses	<ul style="list-style-type: none"> Retained Expert Identification – 10 weeks prior to trial Retained Expert Witness Reports – 5 weeks prior to trial Other Expert Opinion Testimony Summary – 6 weeks prior to trial
Discovery	<ul style="list-style-type: none"> Written Discovery and Depositions — may immediately begin but depositions and propounding of written discovery may not occur after 60 days prior to trial Expert Witness Depositions – must be completed 2 weeks prior to trial
Dispositive Motions	Summary judgment motions, motions to dismiss, and motions for rulings of law must be filed and served no later than 1 week prior to trial
Expert Testimony Motions	4 weeks prior to trial
Discovery Motions	4 weeks prior to trial
Jury Instructions	Exchanged 1 week prior to trial
Exhibits	Exchanged 4 days prior to trial
Trial Briefs	1 week prior to trial
Pretrial Conference	1 week prior to trial

These truncated deadlines are necessary for this matter to be resolved on the merits with fairness to all parties.

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MOTION TO CHARACTERIZE CASE AS NON-ROUTINE AND TO SET EXPEDITED DISCOVERY
AND AUGUST 2020 TRIAL DATE
RESOURCE DEVELOPMENT COUNCIL, INC. ET AL. V. FENUMAI AND DIVISION OF ELECTIONS
CASE NO. 3AN-20-05901 CI

PAGE 8 OF 9

EXC 017

000496

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court, in accordance with the Third Judicial District's Uniform Pretrial Order, characterize this lawsuit as "non-routine," to set the above-listed pretrial deadlines and trial for August 2020.

DATED at Anchorage, Alaska this 17th day of April, 2020.

HOLLAND & KNIGHT LLP
Attorneys for Plaintiffs

By: /s/Matthew Singer
Matthew Singer
Alaska Bar No. 9911072

By: /s/Lee C. Baxter
Lee C. Baxter
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MOTION TO CHARACTERIZE CASE AS NON-ROUTINE and TO SET EXPEDITED DISCOVERY
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PAGE 9 OF 9

EXC 018

000497



Lieutenant Governor Kevin Meyer
STATE OF ALASKA

March 17, 2020

Robin O. Brena
810 N Street, Suite 100
Anchorage, AK 99501

Re: 19OGTX – Fair Share Initiative

Mr. Brena:

I have reviewed your petition for the initiative entitled "An Act changing the oil and gas production tax for certain fields, units, and nonunitized reservoirs on the North Slope" and have determined that the petition was properly filed. My notice of proper filing is enclosed. Specifically, the petition was signed by qualified voters from all 40 house districts equal in number to at least 10 percent of those who voted in the preceding general election; with signatures from at least 30 house districts matching or exceeding seven percent of those who voted in the preceding general election in the house district. The Division of Elections verified 39,174 voter signatures, which exceeds the 28,501 signature requirement based on the 2018 general election. A copy of the Petition Statistics Report prepared by the Division of Elections is enclosed.

With the assistance of the attorney general, I have prepared the following ballot title and proposition that meets the requirements of AS 15.45.180:

***An Act changing the oil and gas production tax for certain fields, units, and
nonunitized reservoirs on the North Slope***

This act would change the oil and gas production tax for areas of the North Slope where a company produced more than 40,000 barrels of oil per day in the prior year and more than 400 million barrels total. The new areas would be divided up based on "fields, units, and nonunitized reservoirs" that meet the production threshold. The act does not define these terms. For any areas that meet the production threshold, the tax would be the greater of one of two new taxes.

(1) One tax would be a tax on the gross value at the point of production of the oil at a rate of 10% when oil is less than \$50 per-barrel. This tax would increase to a maximum of 15% when oil is \$70 per-barrel or higher. No deductions could take the tax below the 10% to 15% floor.

(2) The other tax, termed an "additional tax," would be based on a calculation of a production tax value for the oil that would allow lease expenditure and transportation cost deductions. This tax on production tax value would be calculated based on the difference between the production tax value of the oil and \$50. The difference between the two would be multiplied by the volume of oil, and then that amount would be multiplied by 15%. The existing per-taxable-barrel credit would not apply. The act uses the term "additional tax" but it does not specify what the new tax is in addition to.

Robin O. Brena
March 17, 2020
Page 2

The tax would be calculated for each field, unit, or nonunitized reservoir on a monthly basis. Taxes are currently calculated on an annual basis, with monthly estimated payments. Since these new taxes would only apply to certain areas, a taxpayer would still have to submit annual taxes for the areas where the new taxes do not apply.

The act would also make all filings and supporting information relating to the calculation and payment of the new taxes "a matter of public record." This would mean the normal Public Records Act process would apply.

Should this initiative become law?

This ballot proposition will appear on the election ballot of the first statewide general, special, or primary election that is held after (1) the petition has been filed; (2) a legislative session has convened and adjourned; and (3) a period of 120 days has expired since the adjournment of the legislative session. Barring an unforeseen special election or adjournment of the current legislative session occurring on or before April 19, 2020, this proposition will be scheduled to appear on the general election ballot on the November 3, 2020 general election. If a majority of the votes cast on the initiative proposition favor its adoption, I shall so certify and the proposed law will be enacted. The act becomes effective 90 days after certification.

Please be advised that under AS 15.45.210, this petition will be void if I, with the formal concurrence of the attorney general, determine that an act of the legislature that is substantially the same as the proposed law was enacted after the petition has been filed and before the date of the election. I will advise you in writing of my determination in this matter.

Please be advised that under AS 15.45.240, any person aggrieved by my determination set out in this letter may bring an action in the superior court to have the determination reversed within 30 days of the date on which notice of the determination was given.

If you have questions or comments about the ongoing initiative process, please contact my staff, April Simpson, at (907) 465-4081.

Sincerely,



Kevin Meyer
Lieutenant Governor

Enclosures

cc: Kevin G. Clarkson, Attorney General
Gail Fenumiai, Director of Elections



Lieutenant Governor Kevin Meyer
STATE OF ALASKA

NOTICE OF PROPER FILING

I, KEVIN MEYER, LIEUTENANT GOVERNOR FOR THE STATE OF ALASKA, under the provisions of Article XI of the Constitution of the State of Alaska and under the provisions of AS 15.45, hereby provide notice that the initiative petition for "An Act changing the oil and gas production tax for certain fields, units, and nonunitized reservoirs on the North Slope" which was received on August 16, 2019, and known as 19OGTX, was properly filed.

I have determined that the initiative sponsors have timely filed the petition and that the petition is signed by qualified voters (1) equal in number to 10 percent of those who voted in the preceding general election; (2) resident in at least three-fourths of the house districts in the state; and (3) who, in each of the house districts, are equal in number to at least seven percent of those who voted in the preceding general election in the house district.

In accordance with AS 15.45.190, the Director of the Division of Elections shall place the ballot title and proposition on the election ballot of the first statewide general, special, or primary election that is held after a period of 120 days has expired since the adjournment of the legislative session. Barring any unforeseen special election or adjournment of the current legislative session on or before April 19, 2020, this proposition is scheduled to appear on the general election ballot on the November 3, 2020 general election.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed hereto the Seal of the State of Alaska, at Juneau, Alaska,

This 17th day of March, 2020.


KEVIN MEYER, LIEUTENANT GOVERNOR

From: ginger.bozeman@alaska.gov
To: ANC_civil@akcourts.us, matt.singer@hklaw.com, lee.baxter@hklaw.com, rbrena@brenalaw.com,
Cc: margaret.paton-walsh@alaska.gov, cori.mills@alaska.gov
Subject: 3AN-20-05901CI; Response to Plaintiffs Mot. to Characterize Case as Non-Routine and COS
Date: 4/30/2020 4:08:55 PM

anc.law.ecf@alaska.gov

**IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE**

RESOURCE DEVELOPMENT)
COUNCIL FOR ALASKA, INC.;)
ALASKA TRUCKING ASSOCIATION,)
INC.; ALASKA MINERS)
ASSOCIATION, INC.; ASSOCIATED)
GENERAL CONTRACTORS OF)
ALASKA; ALASKA CHAMBER;)
ALASKA SUPPORT INDUSTRY)
ALLIANCE,)

Plaintiffs,)

v.)

KEVIN MEYER, in his official capacity)
as Lt. Governor of the State of Alaska;)
GAIL FENUMIAI, in her capacity as)
Director of the Alaska Division of)
Elections; the STATE OF ALASKA,)
DIVISION OF ELECTIONS; and VOTE)
YES FOR ALASKA'S FAIR SHARE,)

Defendants.)

**FILED in the TRIAL COURTS
STATE OF ALASKA, THIRD DISTRICT**

APR 30 2020

By Clerk of the Trial Courts
Deputy

Case No. 3AN-20-05901 CI

**d STATE DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO
CHARACTERIZE CASE AS NON-ROUTINE AND CROSS-MOTION TO
DISMISS PURSUANT TO ALASKA CIVIL RULE 12(b)(6) #3**

The plaintiffs—the Alaska Chamber and a variety of non-profit corporations supporting industry and development in Alaska—have sued the State and the sponsors of a ballot measure, 19OGTX, for injunctive and declaratory relief. The plaintiffs claim that a national professional signature gathering company—Advanced Micro Targeting (“AMT”)—violated Alaska law by paying signature gatherers in excess of \$1 per signature obtained in support of putting 19OGTX on the ballot. The initiative sponsors

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EXC 022

000451

hired AMT to collect the voter signatures needed to have the initiative placed on the ballot. [Complaint at ¶ 14] Based on the content of an AMT recruitment, [Complaint at ¶ 22], the plaintiffs allege that the petition circulators working for AMT provided false affidavits in support of the petition booklets. The plaintiffs ask this Court to declare that the alleged false affidavits render the signatures in the booklets invalid and to enjoin the Lieutenant Governor from counting the signatures contained in those booklets. [Complaint at 8-9]

As the plaintiffs note in their Motion to Characterize Case as Non-Routine, the legal effect of a factual determination that petition circulators filed false certification affidavits is a question of first impression in Alaska. [Mot. at 5-6] Although the plaintiffs have cited a number of out-of-state cases where courts invalidated signatures contained in booklets certified by false affidavits, these cases generally involve other indicia of fraud affecting the genuineness of the signatures themselves,¹ contrary authority also exists, and many of the cases note the strong First Amendment interests of citizens to support

¹ See e.g., *Weisberger v. Cohen*, 22 N.Y.S.2d 1011 (N.Y. Sup. Ct. 1940) (petition sheets invalidated where some signatures were forged showing that authenticating witness had signed false affidavit); *McCaskey v. Kirchoff*, 152 A.2d 140 (N.J. Super.A.D. 1959) (signatures were forgeries showing authenticating affidavits were false); *Sturdy v. Hall*, 143 S.W.2d 547 (Ark. 1940) (allegations included nearly 1200 signatures that “appear to have been written in the same handwriting by persons who had signed other names.”); *State ex rel Gongwer v. Graves*, 107 N.E. 1018 (Ohio 1913) (petition contained thousands of forged signatures); *Zaiser v. Jaeger*, 822 N.W.2d 472 (ND 2012) (circulators admitted forging signatures). But see e.g., *Maine Taxpayers Action Network v. Sec. of State*, 795 A.2d 75 (Me. 2002) (invalidating all signatures collected by individual posing as James Powell, because there was no evidence of who he really was).

initiatives and the parallel state constitutional rights at issue.² The strength of those interests, combined with the nature of the statutory scheme and the existence of criminal penalties as a separate incentive to comply with the law suggests that in Alaska, otherwise valid signatures should not be invalidated solely because of petition circulators' violation of the payment limitation in AS 15.45.110(c). Although the Division shares the plaintiffs' concern with the possible violation of Alaska's limitation on the payment of signature gatherers, a remedy that would thwart voters' constitutional right to propose and enact initiatives through no fault of their own is inappropriate.

The plaintiffs correctly note that this litigation will have to proceed on an extremely expedited schedule in order for the factual issues to be resolved at a trial before the initiative appears on the ballot in November. For this reason, the state defendants now move to dismiss the complaint so that the Court can decide the legal issue as a preliminary matter, thereby avoiding wasting judicial resources.³

² See e.g., *Citizens Comm. For D.C. Video Lottery Terminal Initiative v. D.C. Board of Elections & Ethics*, 860 A.2d 813, 835 (D.C. Ct. App. 2004) (Ruiz, J., concurring) (noting that petition signing is "core political speech" and concluding that "[p]articularly where the signatures collected do not decide an election, but merely determine whether an issue is to be presented to the full electorate for a vote, the First Amendment balance should be struck in favor of speech.").

³ The state defendants further note that they are not in possession of any information or documents not already in the possession of the plaintiffs that would assist this Court in determining whether the factual allegations of the complaint are true. Such information would appear to be available primarily from Advanced Micro Targeting, but the plaintiffs have not named AMT as a defendant in this matter.

I. FACTS

The sponsors of the initiative at issue here—Vote Yes For Alaska’s Fair Share—filed their initiative application, identified as 19OGTX by the Division of Elections, on August 16, 2019.⁴ The initiative bill was titled: “An Act relating to the oil and gas production tax, tax payments, and tax credits.” Lieutenant Governor Kevin Meyer certified the application on October 15, 2019, and the Division of Elections released petition booklets to sponsors for circulation on October 23, 2019. On January 17, 2020, the sponsors filed their petition and the signed booklets with the Division of Elections.

According to the allegations made in the complaint, which for purposes of a motion to dismiss must be accepted as true, the sponsors of 19OGTX hired AMT to gather signatures in support of placing the initiative on the ballot. [Complaint at ¶ 14] The complaint alleges that AMT offered and paid signature gatherers more than \$1 per signature in violation of AS 15.45.110(c). [Complaint at ¶¶ 22, 24] The complaint further alleges that those signature gatherers then falsely swore that they had complied with AS 15.45.110(c) when they certified the petition booklets. [Complaint at ¶ 25]

The sponsors of 19OGTX submitted a total of 786 petition booklets. Of those, 544 booklets were certified by circulators who indicated that they were paid by AMT to collect signatures. The Division reviewed the signatures and determined that of the

⁴ All of the information on filings and notifications relating to the initiative along with links to the documents are publicly available on the Division of Election’s website found at <http://www.elections.alaska.gov/Core/initiativepetitionlist.php#19OGTX> (April 24, 2020). In considering a motion to dismiss, a court may consider public records, such as the information about ballot measures on the Division’s website. *See Nizinski v. Currington*, 517 P.2d 754, 756 (Alaska 1973).

44,881 signatures submitted, 39,174 were qualified voters.⁵ On March 17, 2020, the Lieutenant Governor issued a notice to the sponsors that the petition was properly filed.

On April 10, 2020, the plaintiffs filed this lawsuit naming the Lieutenant Governor, the Director of Elections, the State of Alaska Division of Elections, and Vote Yes For Alaska's Fair Share as defendants. The plaintiffs have not sued AMT or any of the signature gatherers.

II. STANDARD FOR GRANTING A MOTION TO DISMISS

Alaska Civil Rule 12(b)(6) authorizes dismissal of a complaint "for failure to state a claim upon which relief can be granted." A motion filed under this rule tests the legal sufficiency of the claims in the complaint. If a plaintiff fails to allege a set of facts that would establish an enforceable cause of action, the complaint should be dismissed. In considering a motion to dismiss, a court may consider public records.⁶

The complaint here requests a declaration "that the 19OGTX petition booklets that are supported by false circulator affidavits have not been properly certified under AS 15.45.130 and that the signatures in those booklets may not be counted," [Complaint at ¶ 32] and "an order that Lt. Governor Meyer must invalidate those petition booklets and all subscriptions contained within those booklets as not properly certified." [Complaint at ¶ 36] These requests are based on the plaintiffs' theory that, under Alaska law, signatures gathered by petition circulators who falsely swore that they were not paid

⁵ 19OGTX petition summary report available at <http://www.elections.alaska.gov/petitions/19OGTX/19OGTX-PetSumReportFINAL.pdf>.

⁶ *Nizinski*, 517 P.2d at 756.

more than a dollar per signature are invalid and may not be counted. If the plaintiffs are wrong that the remedy for violation of AS 15.45.110(c) is invalidation of signatures, then the complaint against the state defendants should be dismissed for failure to state a claim for which relief may be granted.

III. ARGUMENT

A. The constitutional and statutory provisions governing the collection and review of voter signatures in support of an initiative petition.

This case requires the court to interpret the statutes governing the collection of signatures in support of an initiative petition, AS 15.45.105—.160, and more specifically the statute governing certification of petition signatures, AS 15.45.130. As an initial matter, the Alaska Constitution says nothing about certification. Art. XI, § 3 first directs the Lieutenant Governor to prepare a petition containing a summary of the initiative for circulation by the sponsors; and then provides:

If signed by qualified voters who are equal in number to at least ten percent of those who voted in the preceding general election, who are resident in at least three-fourths of the house districts of the State, and who, in each of those house districts, are equal in number to at least seven percent of those who voted in the preceding general election in the house district, it may be filed with the lieutenant governor.

Thus, the constitution is squarely focused solely on the number of signatures of qualified voters, rather than the signature-gathering process. The process is a creature of statute.

At the heart of this case is AS 15.45.110, which prohibits payment of more than \$1 per signature to petition circulators. The statute provides in relevant part:

AS 15.45.110. Circulation of petition; prohibitions and penalty.

...

(c) A circulator may not receive payment or agree to receive payment that is greater than \$1 a signature, and a person or an organization may not pay or agree to pay an amount that is greater than \$1 a signature, for the collection of signatures on a petition.

...

(e) A person or organization that violates (c) or (d) of this section is guilty of a class B misdemeanor.

Equally important, AS 15.45.130 requires that "each petition shall be certified by an affidavit by the person who personally circulated the petition;" and provides that "the lieutenant governor may not count subscriptions on petitions not properly certified at the time of filing or corrected before the subscriptions are counted." Alaska Statute 15.45.130 sets forth the elements of the circulator's affidavit, which include the statement that the circulator's pay is consistent with AS 15.45.110(c), quoted above:

The affidavit must state in substance

- (1) that the person signing the affidavit meets the residency, age, and citizenship qualifications for circulating a petition under AS 15.45.105;
- (2) that the person is the only circulator of that petition;
- (3) that the signatures were made in the circulator's actual presence;
- (4) that, to the best of the circulator's knowledge, the signatures are the signatures of the persons whose names they purport to be;
- (5) that, to the best of the circulator's knowledge, the signatures are of persons who were qualified voters on the date of signature;
- (6) that the circulator has not entered into an agreement with a person or organization in violation of AS 15.45.110(c);
- (7) that the circulator has not violated AS 15.45.110(d) with respect to that petition; and
- (8) whether the circulator has received payment or agreed to receive payment for the collection of signatures on the petition, and, if so,

the name of each person or organization that has paid or agreed to pay the circulator for collection of signatures on the petition.

Alaska Statute 15.45.120 provides that “[a]ny qualified voter may subscribe to the petition by printing the voter’s name, a numerical identifier, and an address, by signing the voter’s name, and by dating the signature.” Finally, AS 15.45.160 lays out the “[b]ases for determining the petition was improperly filed, and provides that:

[t]he Lieutenant Governor shall notify the committee that the petition was improperly filed upon determining that (1) there is an insufficient number of qualified subscribers; (2) the subscribers were not resident in at least three-fourths of the house districts of the state; or (3) there is an insufficient number of qualified subscribers from each of the house districts described in (2) of this section.

Notably, the statutory scheme does not provide for any kind of investigation of circulator affidavits by the lieutenant governor⁷ or the Division of Elections nor does it contemplate a hearing to consider evidence of alleged wrongdoing by circulators or sponsors in the collection of signatures.⁸

Thus, in order to determine whether “there is an insufficient number of subscribers” as directed by AS 15.45.160, the Lieutenant Governor is authorized only to review the circulators’ affidavits to ensure that they contain the statements required by AS 14.45.130—i.e. are “properly certified at the time of filing”—and verify that the

⁷ Cf. *Zaiser v. Jaeger*, 822 N.W.2d 472, 477 (N.D. 2012) (describing statutory requirement that Secretary of State investigate random sample of signatures “by use of questionnaires, postcards, telephone calls, personal interviews, or other accepted information-gathering techniques, or any combinations thereof, to determine the validity of the signatures.”).

⁸ Cf. *Citizens Comm. for D.C. Video Lottery Terminal Initiative*, 860 A.2d at 816 (noting that election board rejected petition sheets “after a lengthy evidentiary hearing.”).

subscribers are "qualified voters" by comparing the information in the petition booklets with voter registration records.

B. The Alaska Supreme Court construes the initiative statutes liberally so as to protect the right of the people to propose and enact laws by initiative.

The Alaska Supreme Court has repeatedly held that "[i]n matters of initiative and referendum ... the people are exercising a power reserved to them by the constitution and the laws of the state, and ... the constitutional and statutory provisions under which they proceed should be liberally construed."⁹ To that end, "all doubts as to all technical deficiencies or failure to comply with the exact letter of procedure will be resolved in favor of the accomplishment of that purpose."¹⁰ As the court has said, "[i]n other words, we 'preserve [initiatives] whenever possible,'"¹¹ and "seek 'a construction [of statutes and regulations] ... which avoids the wholesale dis[en]franchisement of qualified electors.'"¹²

Although the plaintiffs have cited a number of out of state cases to support their claim that "invalidation of all signatures is the appropriate remedy to ensure compliance"

⁹ *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173, 1181 (Alaska 1985) (quoting *Boucher v. Engstrom*, 528 P.2d 456, 462 (Alaska 1974)); see also *Nw. Cruiseship Ass'n of Alaska v. State, Office of Lieutenant Governor, Division of Elections*, 145 P.3d 573, 577 (Alaska 2006); *Planned Parenthood of Alaska v. Campbell*, 232 P.3d 725, 729 (Alaska 2010).

¹⁰ *Yute Air*, 698 P.2d at 1181 (quoting *Boucher*, 528 P.2d at 462).

¹¹ *Planned Parenthood*, 232 P.3d at 729 (citing *Pullen v. Ulmer*, 923 P.2d 54, 58 (Alaska 1996)).

¹² *Nw. Cruiseship Ass'n*, 145 P.3d at 578 (quoting *Fischer v. Stout*, 741 P.2d 217, 225 (Alaska 1987)).

with the statutory prohibition against paying signature gatherers more than a dollar per signature, [Mot. at 5-6] they ignore contrary authority¹³ and do not grapple with the Alaska cases establishing the Court's strong direction to read the statutory requirements in favor of preserving Alaskans' initiative rights.

C. This Court should construe the statutes so as to avoid "the wholesale disenfranchisement of qualified electors."

The Division of Elections verified 39,174 signatures in support of 19OGTX.¹⁴ The complaint does not allege that the Division's determination that 39,174 qualified voters signed the petition was incorrect, nor does it claim that this "is an insufficient number of qualified subscribers."¹⁵ Notably, the complaint makes no allegations that the signatures are themselves fraudulent, unlike the facts in many of the cases relied upon by the plaintiffs.¹⁶

Instead, they argue that this Court should invalidate the signatures of thousands of qualified voters based on the alleged misconduct of signature gatherers over whom the voters had no control and about which the voters had no way to know. Because this result

¹³ See e.g., *Lefkowitz v. Cohen*, 29 N.Y.S.2d 817, 820-21 (N.Y.A.D. 1 Dept., 1941) (holding that voters "should not lose their right to designate a candidate simply because others over whom they have no control may have perpetrated a wrong."); see also, *Petition of Smith*, 276 A.2d 868, 873 (N.J. Super. A.D. 1971) (distinguishing *McCaskey v. Kirchoff*, 152 A.2d 140 (N.J. Super. A.D. 1959), cited by plaintiffs, [Mot. at 5, n.10], because that case involved wrongdoing by candidates in support of their own election).

¹⁴ See Letter from Lieutenant Governor, Kevin Meyer to Robin Brena, March 17, 2020, available at <http://www.elections.alaska.gov/petitions/19OGTX/19OGTX-LetterToSponsor.pdf>.

¹⁵ AS 15.45.160(1).

¹⁶ See cases cited *supra* n. 1.

is contrary to the Alaska constitution, the statutory scheme and Alaska precedent, and unnecessarily infringes on Alaska voters' constitutional right to propose and enact initiatives, this Court should reject this argument.

First, the statutes do not authorize, much less require, more than a facial review of circulators' affidavits. AS 15.45.130 directs that "[i]n determining the sufficiency of the petition, the lieutenant governor may not count subscriptions on petitions not properly certified at the time of filing or corrected before the subscriptions are counted." The statute also provides what the certifying affidavits must state in substance, as explained above.¹⁷ And although this language is not unambiguous, combined with the lack of investigatory authority of the Division, it appears to contemplate only a review of the face of the affidavits rather than a searching inquiry into the truthfulness of the affiants. In other words, the only way that the Division can determine that a petition is "properly certified *at the time of filing*" is by checking whether the affidavit contains the information laid out in the statute, not by investigating whether that information is actually true. Moreover, the Legislature has provided a criminal penalty for violation of the prohibition on paying signature gatherers more than a dollar a signature, making it a class B misdemeanor.¹⁸ The Legislature did not identify false affidavits as a basis for determining that a petition was improperly filed under AS 15.45.160. To be clear, the Division is not arguing that a failure to comply with AS 15.45.110(c) does not matter. On

¹⁷ AS 15.45.130(1)-(8).

¹⁸ See AS 15.45.110(e).

the contrary, the Division is strongly committed to ensuring the integrity of Alaska's elections. But it can only exercise power given to it by the statutes; and, here, the Legislature has not provided authority for the Division to investigate affidavits.¹⁹

Thus, the statutory scheme provides for a criminal penalty to incentivize compliance with AS 15.45.110, rather than giving the Division of Elections either the authority or the ability to enforce the statute by invalidating signatures gathered by petition circulators paid in excess of the statutory maximum.

Second, invalidation of the signatures of voters who have themselves committed no wrong is also plainly inconsistent with Alaska Supreme Court precedent, notwithstanding the fact that many other state courts have upheld this remedy. The Alaska Supreme Court has "consistently construed election statutes in favor of voter enfranchisement,"²⁰ and declined to invalidate the ballots of voters based on the errors of election officials,²¹ offering little support for the plaintiffs' contention that Alaska law would countenance the mass invalidation of otherwise qualified voter signatures based on the misconduct of signature gatherers.

¹⁹ See *Mich. Civil Rights Initiative v. Board of State Canvassers*, 708 N.W.2d 139, 146 (Mich. Ct.App. 2005) (holding that Board of State Canvassers lacked authority to investigate allegations that signatures procured fraudulently because "the Legislature has only conferred upon the Board the authority to canvass the petition 'to ascertain if the petitions have been signed by the requisite number of qualified and registered electors.'").

²⁰ *Miller v. Treadwell*, 245 P.3d 867, 870 (Alaska 2010).

²¹ See e.g., *Willis v. Thomas*, 600 P.2d 1079, 1087 (Alaska 1979); *Fischer v. Stout*, 741 P.2d 217, 223-24 (Alaska 1987).

Alaska law is more consistent with the view of the Missouri Supreme Court in *United Labor Committee of Missouri v. Kirkpatrick*, which noted that the constitutional right to initiative “by the required number of legal voters should not be lightly cast aside”²² and rejected the argument that false certification definitely invalidated signatures. That court found that validation of signatures as shown through voter registration list checks and testimony of circulators was sufficient to overcome the problem created by false notarization of petitions.²³ The court emphasized that it did “not condone the improper signing by circulators of initiative petitions or of affidavits,” noting that the Missouri Legislature made that a crime “punishable by up to two years in the penitentiary.”²⁴ But the court held that the remedy for “those who swore false oaths” is criminal prosecution, not “nullification of the good faith subscription by the voters to the petitions.”²⁵

Because the plaintiffs have not alleged that the signatures gathered by the sponsors and counted by the Division do not represent the genuine support of informed and qualified Alaska voters, this Court should similarly hold that the remedy for any violation of AS 15.45.110(c) lies in the criminal prosecution provided for in AS 15.45.110(e), and not in the wholesale disenfranchisement of nearly 40,000 Alaska voters.

²² *United Labor Committee of Missouri v. Kirkpatrick*, 572 S.W.2d 449, 453 (Mo. 1978).

²³ *Id.* at 456.

²⁴ *Id.*

²⁵ *Id.* at 456–57.

IV. CONCLUSION

The complaint in this case does not allege any underlying fraud suggesting that 19OGTX did not attract the support of the requisite number of qualified Alaska voters to earn a place on the ballot. In the absence of any such allegations, and given that AS 15.45.110(e) provides for criminal penalties for violating the circulator payment limits, this Court should hold that otherwise qualified voters' signatures are not invalidated solely because of circulators were paid more than \$1 per signature; and grant the state defendants' motion to dismiss.

DATED April 30, 2020.

KEVIN G. CLARKSON
ATTORNEY GENERAL

By:



Margaret Paton-Walsh
Alaska Bar No. 0411074
Cori Mills
Alaska Bar No. 1212140
Assistant Attorneys General

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Subject: 3AN-20-05901 CI: Answer of Vote Yes for Alaska's Fair Share
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FILED in the TRIAL COURTS
STATE OF ALASKA, THIRD DISTRICT

MAY 04 2020

Clerk of the Trial Courts
By _____ Deputy

Attorneys for Defendant Vote Yes for
Alaska's Fair Share

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

RESOURCE DEVELOPMENT COUNCIL)
FOR ALASKA, INC.; ALASKA TRUCKING)
ASSOCIATION, INC.; ALASKA MINERS)
ASSOCIATION, INC.; ASSOCIATED)
GENERAL CONTRACTORS OF ALASKA;)
ALASKA CHAMBER; ALASKA SUPPORT)
INDUSTRY ALLIANCE,)

Plaintiffs,)

v.)

KEVIN MEYER, in his official capacity)
as Lt. Governor of the State of Alaska;)
GAIL FENUMIAI, in her capacity as Director)
of the Alaska Division of Elections; the)
STATE OF ALASKA, DIVISION OF)
ELECTIONS; and VOTE YES FOR)
ALASKA'S FAIR SHARE,)

Defendants.)

Case No. 3AN-20-05901CI

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ANSWER OF VOTE YES FOR ALASKA'S FAIR SHARE
RDC et al. v. Meyer, et al.
Case No. 3AN-20-05901 CI

May 4, 2020
Page 1 of 7

EXC 036

000014

ANSWER OF VOTE YES FOR ALASKA'S FAIR SHARE

Vote Yes for Alaska's Fair Share ("Fair Share"), by and through its counsel, Brena, Bell & Walker, P.C., hereby answers Plaintiffs' Complaint as follows:

GENERAL ALLEGATIONS

1. Fair Share lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 1 of the Complaint, and those allegations are therefore denied.

2. Fair Share lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 2 of the Complaint, and those allegations are therefore denied.

3. Fair Share lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 3 of the Complaint, and those allegations are therefore denied.

4. Fair Share lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 4 of the Complaint, and those allegations are therefore denied.

5. Fair Share lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 5 of the Complaint, and those allegations are therefore denied.

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ANSWER OF VOTE YES FOR ALASKA'S FAIR SHARE
RDC et al. v. Meyer, et al.
Case No. 3AN-20-05901 CI

May 4, 2020
Page 2 of 7

6. Fair Share lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 6 of the Complaint, and those allegations are therefore denied.

7. Admitted.

8. Admitted.

9. Admitted.

10. Admitted.

11. Admitted that current Alaska law restricts the payment-per-signature method of compensating signature gatherers to \$1 per signature, otherwise denied.

12. Admitted.

13. Admitted that on or about October 29, 2019, Fair Share hired Texas Petition Strategies, LLC, of Buda, Texas, otherwise denied.

14. Denied.

15. Admitted.

16. Admitted.

17. Admitted.

18. Admitted.

19. Admitted that the requirements of AS 15.45.130 speak for themselves, otherwise denied.

20. Admitted.

21. Denied.

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ANSWER OF VOTE YES FOR ALASKA'S FAIR SHARE
RDC et al. v. Meyer, et al.
Case No. 3AN-20-05901 CI

May 4, 2020
Page 3 of 7

EXC 038

000016

22. Fair Share lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 22 of the Complaint, and those allegations are therefore denied.

23. Fair Share lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 23 of the Complaint, and those allegations are therefore denied.

24. Admitted that signature gatherers were paid with a method of compensation other than payment-per-signature, otherwise denied.

25. Denied.

COUNT I – DECLARATORY JUDGMENT
(Violation of AS 15.45.110(c) and AS 15.45.130)

26. Nothing to admit or deny.

27. Admitted that AS 15.45.110(c) restricts the payment-per-signature method of compensating signature gatherers to \$1 per signature, otherwise denied.

28. Admitted that the text of AS 15.45.130 speaks for itself.

29. Admitted that the text of AS 15.45.130 speaks for itself.

30. Denied.

31. Denied.

32. Denied.

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ANSWER OF VOTE YES FOR ALASKA'S FAIR SHARE
RDC et al. v. Meyer, et al.
Case No. 3AN-20-05901 CI

May 4, 2020
Page 4 of 7

COUNT II – INJUNCTIVE RELIEF
(Invalidation of Offending Petition Booklets)

- 33. Nothing to admit or deny.
- 34. Admitted that the text of AS 15.45.130 speaks for itself.
- 35. Admitted that signature gatherers were paid with a method of compensation other than payment-per-signature, otherwise denied.
- 36. Denied.

AFFIRMATIVE DEFENSES

- 1. Plaintiffs' Complaint fails to state a claim upon which relief can be granted.
- 2. Plaintiffs lack standing to pursue the relief sought within their Complaint.
- 3. Plaintiffs' claims are barred by the appropriate statute of limitations.
- 4. Plaintiffs' claims are barred by estoppel.
- 5. Plaintiffs' claims are barred by laches.
- 6. Plaintiffs' claims are barred by waiver.
- 7. To the extent that AS 15.45.110(c) is interpreted to apply to methods of compensation other than payment-per-signature, the criminal penalty provided under AS 15.45.110(e) is the express and exclusive remedy for any alleged violation.
- 8. To the extent that AS 15.45.110(c) is interpreted to apply to methods of compensation other than payment-per-signature, the statute is unconstitutional under the federal and state constitutions.
- 9. Fair Share preserves each and every defense articulated within ARCP 8(c).

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ANSWER OF VOTE YES FOR ALASKA'S FAIR SHARE
RDC et al. v. Meyer, et al.
Case No. 3AN-20-05901 CI

May 4, 2020
Page 5 of 7

10. Fair Share preserves each and every defense articulated within ARCP 12(b).

11. Fair Share preserves any and all additional defenses to be further defined after Fair Share has had the opportunity to obtain any necessary discovery to which it is entitled.

PRAYER FOR RELIEF

WHEREFORE, Fair Share prays for relief as follows:

- 1) That Plaintiffs' Complaint be dismissed, with prejudice;
- 2) That Fair Share be awarded its costs and attorney fees for having had to defend this action; and,
- 3) For other and further relief as this court finds just and equitable.

RESPECTFULLY SUBMITTED this 4th day of May, 2020.

BRENA, BELL & WALKER, P.C.
Counsel for Defendant

By //s// Jon S. Wakeland
Robin O. Brena, Alaska Bar No. 8410089
Jon S. Wakeland, Alaska Bar No. 0911066

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ANSWER OF VOTE YES FOR ALASKA'S FAIR SHARE
RDC et al. v. Meyer, et al.
Case No. 3AN-20-05901 CI

May 4, 2020
Page 6 of 7

Certificate of Service

I hereby certify that a true and correct
copy of the foregoing document
was served by e-mail upon
the following this 4th day of May 2020.

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//s// Melody Nardin
Melody Nardin

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ANSWER OF VOTE YES FOR ALASKA'S FAIR SHARE
RDC et al. v. Meyer, et al.
Case No. 3AN-20-05901 CI

May 4, 2020
Page 7 of 7

EXC 042

000020

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Subject: 3AN-20-05901CI - Opposition to Motion to Dismiss and Reply in Support of Motion to Characterize

Date: 5/12/2020 11:19:41 AM

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

RESOURCE DEVELOPMENT COUNCIL)
FOR ALASKA, INC.; ALASKA TRUCKING)
ASSOCIATION, INC.; ALASKA MINERS)
ASSOCIATION, INC.; ASSOCIATED)
GENERAL CONTRACTORS OF ALASKA;)
ALASKA CHAMBER; and ALASKA)
SUPPORT INDUSTRY ALLIANCE,)

Plaintiffs,)

v.)

KEVIN MEYER, in his official capacity,)
as Lt. Governor of the State of Alaska;)
GAIL FENUMIAI, in her capacity as Director)
of the Alaska Division of Elections; the)
STATE OF ALASKA, DIVISION OF)
ELECTIONS; and VOTE YES FOR)
ALASKA'S FAIR SHARE,)

Defendants.)

FILED in the TRIAL COURTS
STATE OF ALASKA, THIRD DISTRICT

MAY 12 2020

Clerk of the Trial Courts

By _____ Deputy

Case No. 3AN-20-05901CI

**OPPOSITION TO MOTION TO DISMISS AND REPLY IN
SUPPORT OF MOTION TO CHARACTERIZE CASE AS NON-ROUTINE**

I. INTRODUCTION

Because AS 15.45.130 provides that "the lieutenant governor may not count subscriptions on petitions not properly certified at the time of filing or corrected before the subscriptions are counted[.]" Plaintiffs seek invalidation of all petitions for the Fair Share ballot initiative that were supported by false certifications because these subscriptions were

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EXC 043

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“not properly certified.” Specifically, this case is about whether an initiative should be placed on an upcoming statewide ballot if it is determined that professional circulators falsified their sworn certifications to the lieutenant governor to state they were not paid in excess of the statutory maximum to collect those signatures. Based on Alaska's initiative statutes,¹ prior practice by the State of Alaska of invalidating signatures collected in violation of Alaska's law on the payment of circulators and the Alaska Supreme Court's approval of that practice,² and the weight of persuasive authority from other state supreme courts,³ Plaintiffs seek invalidation of all petition booklets for the 19OGTX initiative that are supported by false circulator affidavits.

State Defendants' motion to dismiss⁴ improperly overlooks all of this authority and instead makes a policy argument that it would be unduly harsh to “disenfranchise” the

¹ See AS 15.45.130. AS 15.45.130 provides that “the lieutenant governor may not count subscriptions on petitions not properly certified at the time of filing or corrected before the subscriptions are counted.” It then goes on to explain that the circulator certifies the petition by making truthful statements about themselves and their signature-gathering activities, including that the circulator was not unlawfully paid in excess of \$1 per signature, for the collection of signatures. AS 15.45.130(6). AS 15.45.110(e) makes it a “class B misdemeanor” for a circulator to be paid in excess of \$1 per signature, for the collection of signatures.

² See e.g. *North West Cruiseship Ass'n of Alaska, Inc. v. State*, 145 P.3d 573, 578 (Alaska 2006) (Alaska Supreme Court approving of the Division's disqualification of otherwise valid subscriptions contained on pages of the petition that did not include the required disclosure of who was paying the circulator).

³ See e.g. *Maine Taxpayers Action Network v. Secretary of State*, 795 A.2d 75, 80 (Me. 2002); *Montanans for Justice v. State ex rel. McGrath*, 146 P.3d 759, 778 (Mont. 2006); *Brousseau v. Fitzgerald*, 675 P.2d 713, 715 (Ariz. 1984); *Benca v. Martin*, 500 S.W.3d 742, 745-49 (Ark. 2016).

⁴ State Defendants' Response to Plaintiffs' Motion to Characterize Case as Non-Routine and Cross-Motion to Dismiss Pursuant to Alaska Civil Rule 12(b)(6), at 13 (April 30, 2020) (hereinafter “State Defendants' Motion to Dismiss”).

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OPPOSITION TO MOTION TO DISMISS AND REPLY IN SUPPORT OF MOTION
TO CHARACTERIZE CASE AS NON-ROUTINE

RESOURCE DEVELOPMENT COUNCIL, INC. ET AL. V. FENUMLAI AND DIVISION OF ELECTIONS
CASE NO. 3AN-20-05901 CI

PAGE 2 OF 31

EXC 044

000399

Alaska voters who subscribed to petitions being circulated by professional signature gatherers, even if the signature gatherers were induced with unlawful pay to gather the signatures. The State's motion is contrary to the State's position in other ballot initiative cases, ignores the intent of the Alaska Legislature, and has been rejected in numerous modern cases decided by state supreme courts. Most courts hold that invalidating signatures supported by false certifications is not a disenfranchisement of voters but a proper remedy to insure the integrity and continued viability of the initiative process. No voter is disenfranchised by the state or the court upholding Alaska law and the integrity of Alaska's initiative process.

Nor is it true, as State Defendants suggest, that because the Alaska Legislature has made it a crime for a circulator to submit false statements in their certifications of the signatures they have gathered, the proper remedy is to ignore AS 15.45.130, and allow the lieutenant governor to count subscriptions that are not properly certified. As most other state supreme courts have recognized, a legislature's criminalization of false statements in circulator certifications supports the invalidation of the signatures they have gathered. The Alaska Legislature has rightly determined that the circulator's role in the initiative process is crucial and that truthful certifications are critical to the integrity of that process. By the State's own admission, the misconduct by the Fair Share signature gatherers was criminal. Contrary to the State's position, criminal malfeasance should not be condoned or rewarded,

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OPPOSITION TO MOTION TO DISMISS AND REPLY IN SUPPORT OF MOTION
TO CHARACTERIZE CASE AS NON-ROUTINE

RESOURCE DEVELOPMENT COUNCIL, INC. ET AL. V. FENUMIAI AND DIVISION OF ELECTIONS
CASE NO. 3AN-20-05901 CI

PAGE 3 OF 31

EXC 045

000400

but instead should be punished by invalidating all signatures gathered by a fraudulent circulator.⁵

In addition to being wrong about the law, State Defendants' position is also an improper basis in which to dismiss a case under Rule 12(b)(6) of the Alaska Rules of Civil Procedure ("Rule 12(b)(6)"). The Alaska Supreme Court has long held that to state a claim upon which relief may be granted, a complaint need only set forth factual allegations that are consistent with some enforceable cause of action: "In determining the sufficiency of the state claim it is enough that the complaint set forth allegations of fact consistent with and appropriate to *some enforceable cause of action*."⁶ Here, Plaintiffs have sought declaratory relief in addition to injunctive relief. Even if State Defendants are correct that invalidation of petitions supported by false circulators is not an available remedy, declaratory relief would still be appropriate to determine the unlawful conduct of the circulators.

⁵ For example the Maine Supreme Court explained in justifying the "invalidation of the petition *in toto*[,] that the "circulator's role in a citizens' initiative is pivotal. Indeed, the integrity of the initiative and referendum process in many ways hinges on the trustworthiness and veracity of the circulator." *Maine Taxpayers Action*, 795 A.2d at 80. "In fact, the Legislature considers the circulator's swearing of the oath to be a sufficiently grave act that it has specifically criminalized the providing of a false statement in connection with a petition." *Id.* at 81.

⁶ *Knight v. American Guard & Alert, Inc.*, 714 P.2d 788, 791 (Alaska 1986) (quoting *Linck v. Barokas & Martin*, 667 P.2d 171, 173 (Alaska 1983)) (emphasis in original). In *Knight*, the Alaska Supreme Court quoted Wright & Miller's authoritative treatise on civil procedure that stated: "The court is under a duty to examine the complaint to determine if the allegations provide for relief *on any possible theory*." See *Knight*, 714 P.2d at 791 (quoting 5 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 1357, at 602 (1969)) (original brackets omitted; emphasis in original).

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OPPOSITION TO MOTION TO DISMISS AND REPLY IN SUPPORT OF MOTION
TO CHARACTERIZE CASE AS NON-ROUTINE

RESOURCE DEVELOPMENT COUNCIL, INC. ET AL. V. FENUMIAI AND DIVISION OF ELECTIONS
CASE NO. 3AN-20-05901 CI

PAGE 4 OF 31

EXC 046

000401

Plaintiffs respectfully request the Court deny State Defendants' Motion to Dismiss, and set expedited discovery and an August 2020 trial date in this matter.

II. FACTUAL BACKGROUND⁷

In early January 2020, the official ballot group for a statewide initiative entitled “An Act changing the oil and gas production tax for certain fields, units, and nonunitized reservoirs on the North Slope” (hereinafter “19OGTX”) hired an out-of-state professional signature-gathering company named Advanced Micro Targeting, Inc. (“Advanced Micro Targeting”) to provide circulators to gather subscriptions on petitions supporting 19OGTX's inclusion on this November's general state election ballot.⁸

While Alaska law prohibits the circulators from being paid in excess of \$1 per signature for the collection of signatures and requires each circulator to submit an affidavit swearing they were not unlawfully paid more than this limit, Advanced Micro Targeting's circulators were paid in excess this limit.⁹ These circulators, who were being paid an unlawful amount, collected the vast majority of signatures to get 19OGTX on the ballot.¹⁰ Advanced Micro Targeting circulators submitted 544 petition booklets out of the 786 total submitted to the lieutenant governor.¹¹

⁷ The Alaska Supreme Court, in reviewing a motion to dismiss, does not “consider materials outside the complaint and its attachments.” *Larson v. State, Dept. of Corrections*, 284 P.3d 1, 7 (Alaska 2012). Accordingly, the following is taken directly from Plaintiffs' Complaint.

⁸ Plaintiffs' Complaint, ¶ 14 (Apr. 10, 2020).

⁹ *Id.*, ¶¶ 11, 22.

¹⁰ *Id.*, ¶ 17.

¹¹ *Id.*

Advanced Micro Targeting hired circulators by offering to pay them \$3,500 - \$4,000 per month plus bonus, and expecting circulators to collect 80-100 signatures per day, six days per week in return for such compensation.¹² Many of the Advanced Micro Targeting circulators falsely swore in their circulator affidavits that they were not paid in excess of \$1 per signature.¹³

In this lawsuit, Plaintiffs seek a declaration that these circulators' false affidavits violate Alaska statutes on the payment of circulators, AS 15.45.110(c), and to what a circulator must truthfully swear to have the subscriptions he or she collected count toward the requisite number to have the initiative reach the general ballot, AS 15.45.130.¹⁴ Plaintiffs also seek entry of an injunction that the lieutenant governor may not count the subscriptions collected by any circulator who falsely swore that he or she was not paid an unlawful amount to collect subscriptions and for the lieutenant governor to invalidate all petition booklets supported by a false circulator affidavit.¹⁵

III. DISCUSSION

In Alaska, “[t]he motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted.”¹⁶ To survive a motion to dismiss, a complaint “need only

¹² *Id.*, ¶ 22.

¹³ *Id.*, ¶ 25.

¹⁴ *Id.*, ¶ 32.

¹⁵ *Id.*, ¶ 36.

¹⁶ *Knight v. American Guard & Alert, Inc.*, 714 P.2d 788, 791 (Alaska 1986).

allege a set of facts consistent with and appropriate to some enforceable cause of action.”¹⁷ The court must “presume all factual allegations of the complaint to be true and [make] all reasonable inferences . . . in favor of the non-moving party.”¹⁸ “If, within the framework of the complaint, evidence may be introduced which will sustain a grant of relief to the plaintiff, the complaint is sufficient.”¹⁹ A complaint survives a motion to dismiss even if the plaintiff has not pleaded the correct cause of action or remedy: “In determining the sufficiency of the stated claim it is enough that the complaint set forth allegations of fact consistent with and appropriate to *some enforceable cause of action*.”²⁰ “[T]he court is under a duty to examine the complaint to determine if the allegations provide for relief *on any possible theory*.”²¹

Here, application of these rules confirms this is not the rare case where the Court should grant a motion to dismiss. Plaintiffs have pleaded a viable claim that the Advance Micro Targeting circulators falsified their certifications and that AS 15.45.130 prohibits the lieutenant governor from counting the subscriptions that were certified by those false circulator affidavits. The injunctive remedy Plaintiffs seek—invalidation of petition

¹⁷ *Larson v. State, Dept. of Corrections*, 284 P.3d 1, 6 (Alaska 2012) (quoting *Guerrero v. Alaska Hous. Fin. Corp.*, 6 P.3d 250, 253-54 (Alaska 2000)); *see also Odom v. Fairbanks Memorial Hospital*, 999 P.2d 123, 128 (Alaska 2000).

¹⁸ *Caudle v. Mendel*, 994 P.2d 372, 374 (Alaska 1999) (brackets in original).

¹⁹ *Id.* at 374.

²⁰ *Knight*, 714 P.2d at 791 (quoting *Linck v. Barokas & Martin*, 667 P.2d 171, 173 (Alaska 1983)) (emphasis in *Knight*).

²¹ *Id.* (quoting 5 Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 1357, at 602 (1969)) (emphasis in *Knight*).

booklets supported by false circulator certifications—is clearly an available remedy as the State has invalidated otherwise valid subscriptions because of circulator negligence in the past.²² That remedy should certainly be available in this case, where Plaintiffs are alleging false statements by circulators in their circulator affidavits, not merely circulator negligence in forgetting to include the “paid by” disclosures on each page of a petition booklet. Moreover, Plaintiffs have also requested declaratory relief. Even if the Court ultimately decides against entering the requested injunction, the Court could still enter a declaration that the lieutenant governor may not, under AS 15.45.130, count petitions supported by false circulator affidavits as “properly certified.”

Plaintiffs' Complaint pleads a proper cause of action for at least three reasons, any one of which is grounds to deny the State's motion:

- Plaintiff's position is consistent with the plain meaning of the applicable Alaska statutes;
- the Alaska Supreme Court has previously approved of the State's disqualification of otherwise valid subscriptions to a petition due to failure to abide by statutory requirements; and,
- persuasive decisions from other state supreme courts support Plaintiffs' position.

As further discussed below, this Court should deny the State's motion.

²² See e.g. *North West Cruiseship Ass'n of Alaska, Inc. v. State*, 145 P.3d 573, 578 (Alaska 2006) (Alaska Supreme Court approving of the Division's disqualification of otherwise valid subscriptions contained on pages of the petition that did not include the required disclosure of who was paying the circulator).

A. Alaska Law Prohibits the Lieutenant Governor from Counting Petition Subscriptions that are Supported by False Circulator Affidavits.

While State Defendants correctly quote the text of Article XI of the Alaska Constitution and AS 15.45.010 through AS 15.45.245 regarding ballot initiative petitions,²³ they fail to highlight that AS 15.45.130: (1) requires circulators to certify the subscriptions were obtained lawfully by submitting a sworn affidavit along with the petition booklet containing the signatures, and (2) prohibits the lieutenant governor from counting subscriptions that are not properly certified. This statute, when considered in conjunction with AS 15.45.110(c) and (d), precludes this Court from granting the State's motion to dismiss.

Alaska Statute 15.45.110(c) prohibits the payment of circulators in excess of \$1 per signature for the collection of subscriptions on a petition: "A circulator may not receive payment or agree to receive payment that is greater than \$1 a signature, and a person or an organization may not pay or agree to pay an amount that is greater than \$1 a signature, for the collection of signatures on a petition."²⁴ A "person or organization that violates [AS 15.45.110(c)] is guilty of a class B misdemeanor."²⁵ Importantly, Alaska law also prohibits the lieutenant governor from counting subscriptions within petitions that are not properly certified at the time of filing:

²³ State Defendants' Motion to Dismiss, at 6-9.

²⁴ AS 15.45.110(c).

²⁵ AS 15.45.110(e). In Alaska, class B misdemeanors are punishable by up to 90 days in jail and a fine of up to \$2,000. *See* AS 12.55.035 and 12.55.135.

Before being filed, each petition shall be certified by an affidavit by the person who personally circulated the petition. In determining the sufficiency of the petition, the lieutenant governor may not count subscriptions on petitions not properly certified at the time of filing or corrected before the subscriptions are counted. The affidavit must state in substance . . .

(6) that the circulator has not entered into an agreement with a person or organization in violation of AS 15.45.110(c).²⁶

Like the state statutory schemes governing the review of petition subscriptions and circulator affidavits in Montana, Ohio, Arizona, Maine and Oklahoma, discussed below, this provision contemplates that the lieutenant governor has the ability to investigate and invalidate petition booklets and all subscriptions contained therein if they are supported by a false circulator affidavit.²⁷

Untruthful statements in a circulator affidavit do not “properly certify” the accompanying petition booklet. AS 15.45.130 prohibits the lieutenant governor from counting signatures within petition booklets if the petition booklet is not “properly certified” when the petition is filed. The statute lists eight requirements that a petition circulator must swear to in his or her affidavit. One of those required certifications is that

²⁶ AS 15.45.130 (emphasis added).

²⁷ See e.g. *Montanans for Justice v. State ex rel. McGrath*, 146 P.3d 759, 777 (Mont. 2006) (citing Mont. Code Ann. § 13-27-307 which simply states the secretary of state may “reject any petition that does not meet statutory requirements.”); *Maine Taxpayers Action Network v. Secretary of State*, 795 A.2d 75, 79-80 (Me. 2002) (“The Secretary is vested with the authority to determine whether any petition filed in support of a citizens initiative is valid. The statute does not provide specific grounds for invalidating a signature, but provides broadly that ‘the Secretary of State shall determine the validity of the petition and issue a written decision stating the reasons for the decision. . . .’ Accordingly, we have recognized that the Secretary may disqualify signatures for a failure to follow the requirements of the Constitution or its statutory overlay.”) (internal brackets and citations omitted).

the circulator has not entered into an agreement with a person or organization in violation of the prohibition on paying circulators in excess of \$1 per signature, for the collection of signatures.²⁸ The purpose of the affidavit requirement is to ensure truthful answers, and an untruthful affidavit does not “properly certify” the accompanying petition. Alaska statute *prohibits* the lieutenant governor from counting signatures contained in a petition that is not properly certified.²⁹

State Defendants' argument that the lieutenant governor lacks the authority to invalidate petitions supported by false circulator affidavits is not supported by a single citation to relevant Alaska caselaw or persuasive Outside authority.³⁰ State Defendants' position ignores the plain wording of AS 15.45.130 that the lieutenant governor may not count signatures supported by a false circulator affidavit. Their motion to dismiss must be denied because AS 15.45.110(c) and (d) and AS 15.45.130 permit the remedy Plaintiffs seek in this lawsuit: invalidation of improperly certified subscriptions.

B. The Weight of American Authority Supports Plaintiffs' Position

Contrary to State Defendants' arguments, the greater weight of authority from state supreme courts confirms that invalidation of all subscriptions supported by a false circulator affidavit is the appropriate remedy. These courts reason that their state's criminalization of false statements in circulator affidavits shows that invalidation of all

²⁸ AS 15.45.130(6).

²⁹ AS 15.45.130.

³⁰ State Defendants' Motion to Dismiss, at 11-12 (“[T]he statutes do not authorize, much less require, more than a facial review of circulators' affidavits.”).

signatures supported by the false certification is the appropriate remedy because the legislature found the certification to be a sufficiently grave act to make its violation a crime. Moreover, there is no case supporting State Defendants' argument that because there is no statute specifically detailing how the lieutenant governor or Division of Elections is to conduct an inquiry into the veracity of a circulator affidavit, that the lieutenant governor may not invalidate signatures gathered by a circulator who lies in his circulator affidavit about how he gathered the subscriptions.

A survey of the cases is helpful in illustrating the error in State Defendants' Motion to Dismiss. State Defendants urge this Court to adopt the reasoning of the Missouri Supreme Court's decision over forty years ago in *United Labor Committee of Missouri v. Kirkpatrick*³¹ as persuasive precedent that supports their position in this litigation. But the decision of that divided court is an outlier. It was decided before numerous other state supreme courts looked at this issue and held that petition subscriptions should not be counted if they are supported by a false circulator affidavit.

In *Kirkpatrick*, a sharply divided (4-3) Missouri Supreme Court refused to invalidate all of the signatures contained in petitions which were supported by circulator affidavits that were signed outside the presence of a notary and notarized later and contained signatures collected by someone else other than the circulator.³² Four members of the Missouri Supreme Court were in the majority. These justices declined to invalidate

³¹ *United Labor Committee of Missouri v. Kirkpatrick*, 572 S.W.2d 449 (Mo. 1978).

³² *Id.* at 450-51.

the signatures based on the incorrect premise that the only interest the circulator affidavit served was to facilitate the accurate determination of whether a "sufficient number of registered voters deem an issue important enough that the issue should be put to a vote before the people."³³ Ignoring that the obvious purpose of the numerous Missouri statutes governing circulator affidavits and notarization of the petition booklets was to set rules on how circulators may gather subscription signatures, the four member majority concluded that Missouri's criminal law for willful violations of the initiative statutes was sufficient to vindicate Missouri's initiative laws.³⁴ Three members of the court, including the Chief Justice, dissented and criticized the majority for ignoring the obvious purpose of the statutory rules was to protect the initiative process and the mandatory nature of these rules.³⁵

A much greater weight of authority from other states supports Plaintiffs' position. In *Brousseau v. Fitzgerald*,³⁶ the Arizona Supreme Court rejected the approach taken six years earlier by the Missouri Supreme Court because that approach would nullify the rules the legislature passed to govern how subscriptions were gathered in the first place.³⁷ The defendant was an Arizona resident seeking to collect enough signatures (632 signatures) to gain access to the Democratic primary election for the office of Mayor of the City of

³³ *Id.* at 453.

³⁴ *Id.* at 456-57.

³⁵ *Id.* at 457 (Morgan, C.J., dissenting).

³⁶ *Brousseau v. Fitzgerald*, 675 P.2d 713 (Ariz. 1984).

³⁷ *Id.* at 715.

Tucson.³⁸ Arizona statutes required circulators to be eligible Arizona voters and to witness each subscriber sign the petition.³⁹

The defendant submitted 1,000 signatures along with an affidavit swearing he had personally collected the signatures.⁴⁰ But the evidence at trial showed that non-residents and minors had actually collected the signatures, not the defendant.⁴¹ Nevertheless, when the City of Tucson checked the gathered signatures, there were more than enough valid subscriptions from proper voters for the defendant to meet the threshold and get his name on the ballot.⁴²

A unanimous Arizona Supreme Court rejected the defendant's argument that so long as the subscriber signatures were valid, then the "substance—allowing the will of the people to be expressed through their actual nominating signatures—is more important than fulfilling technical procedures."⁴³ To the contrary, the *Brousseau* court concluded that a circulator's submission of a false affidavit undermines the careful initiative process crafted by the legislature to obtain ballot access:

Defects either in circulation or signatures deal with matters of form and procedure, but the filing of a false affidavit by a circulator is a much more serious matter involving more than a technicality. The legislature has sought to protect the process by providing some safeguards in the way nomination

³⁸ *Id.* at 714.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 715.

⁴³ *Id.*

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OPPOSITION TO MOTION TO DISMISS AND REPLY IN SUPPORT OF MOTION
TO CHARACTERIZE CASE AS NON-ROUTINE

RESOURCE DEVELOPMENT COUNCIL, INC. ET AL. V. FENUMAI AND DIVISION OF ELECTIONS
CASE NO. 3AN-20-05901 CI

PAGE 14 OF 31

EXC 056

000411

signatures are obtained and verified. Fraud in the certification destroys the safeguards unless there are strong sanctions for such conduct such as voiding of petitions with false certifications.⁴⁴

The court held that “petitions containing false certifications by circulators are void, and the signatures on such petitions may not be considered in determining the sufficiency of the number of signatures to qualify for placement on the ballot.”⁴⁵ Arizona has separate, criminal sanctions for filing a false circulator affidavit,⁴⁶ and continues to apply *Brousseau* to invalidate subscriptions supported by false circulator affidavits.⁴⁷

The Ohio Supreme Court reached the same conclusion as the Arizona Supreme Court. In *State ex rel. Schmelzer v. Board of Elections of Cuyahoga County*,⁴⁸ a circulator falsely affirmed in her affidavit that she was a registered Ohio voter to comply with a state statute that permitted only registered Ohio voters to serve as circulators.⁴⁹ The local county board of elections invalidated the 52 signatures collected by this circulator, leaving the candidate seeking ballot access 19 signatures below the threshold.⁵⁰ The candidate

⁴⁴ *Id.* at 715.

⁴⁵ *Id.* at 716.

⁴⁶ See Arizona Revised Statute § 19-118.

⁴⁷ See *Ross v. Bennett*, 265 P.3d 356, 362 (Ariz. 2011) (discussing *Brousseau*'s continued viability and describing its core holding as “Petition sheets bearing false or fraudulent circulator affidavits are void.”); see also *Parker v. City of Tucson*, 314 P.3d 100, 116 (Ariz. App. Ct. 2013) (“The false affidavits rendered the signature sheets void. *Brousseau*, 675 P.2d at 716.”).

⁴⁸ *State ex rel. Schmelzer v. Board of Elections of Cuyahoga County*, 440 N.E.2d 801 (Ohio 1982).

⁴⁹ *Id.* at 802-03.

⁵⁰ *Id.* at 801.

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appealed the decision to the Ohio state courts, and argued that invalidation of voter signatures collected by an unqualified circulator was unduly harsh and a hyper technical application of Ohio's statute setting circulator requirements.⁵¹ The Ohio Supreme Court noted the criminal penalty in Ohio for a circulator's submission of a false affidavit and rejected the argument that the circulator's misconduct should have no effect on voters' subscriptions on her petition: "[W]e view this error not as a technical defect but as a substantial and fatal omission of a specific statutory requirement."⁵²

The Maine Supreme Court reached the same conclusion in *Maine Taxpayers Action Network v. Secretary of State*.⁵³ There, the court was tasked with reviewing the state's decision to invalidate 3,054 signatures in support of an initiative to limit real and personal property taxes in Maine that were collected by a circulator that stole another's identity, and falsely swore in his circulator affidavit as to his identity and that he was a Maine resident.⁵⁴ Invalidation of all of the signatures collected by the circulator left the initiative 2,812 signatures short of the threshold to reach the ballot.⁵⁵ On appeal, the Maine Supreme Court started by recognizing that direct initiatives are "core political speech" and that the U.S. Supreme Court had taught that "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is

⁵¹ *Id.* at 802.

⁵² *Id.* at 803.

⁵³ *Maine Taxpayers Action Network v. Secretary of State*, 795 A.2d 75 (Me. 2002).

⁵⁴ *Id.* at 77.

⁵⁵ *Id.*

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to accompany the democratic processes.”⁵⁶ The court also noted that the legislature had “criminalized the providing of a false statement in connection with a petition” by making it a “Class E crime.”⁵⁷ The court ultimately concluded that because of the crucial role circulators play in the initiative process, a false circulator affidavit rendered all signatures collected by that circulator invalid:

[T]he circulator's role in a citizens' initiative is pivotal. Indeed, the integrity of the initiative and referendum process in many ways hinges on the trustworthiness and veracity of the circulator. In reviewing the signatures gathered by the circulators, the Secretary has the ability to verify through municipal records that a signing voter is actually registered and therefore permitted to vote. In contrast, the Secretary has no way, without engaging in a separate investigation, to verify that a signing voter actually signed the petition. Thus, the circulator's oath is critical to the validation of a petition. Indeed the oath is of such importance that the Constitution requires that it be sworn in the presence of a notary public. ... In addition to obtaining truthful information from the circulator, the oath is intended to assure that the circulator is impressed with the seriousness of his or her obligation to honesty, and to assure that the person taking the oath is clearly identified should questions arise regarding particular signatures. As early as 1917, we held that verification of the signatures and the subsequent oath taken by the circulator is an “indispensable accompaniment of a valid petition,” and, accordingly, that the invalidation of signatures lacking this prerequisite is necessary to preserve the integrity of the initiative and referendum process.⁵⁸

The court therefore invalidated all of the signatures contained in these petition booklets “*in toto*.”⁵⁹

⁵⁶ *Id.* at 78-79 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

⁵⁷ *Id.* at 81.

⁵⁸ *Id.* at 80 (internal citations and brackets omitted).

⁵⁹ *Id.*

The Montana Supreme Court likewise upheld the state attorney general's invalidation of signatures in support of three ballot initiatives that were collected by circulators who falsely swore to the location of their physical addresses in Montana⁶⁰ and that they had personally viewed all subscribers sign the petition.⁶¹ The circulators had also likely employed a "bait and switch" tactic to induce people who knowingly signed one petition to unknowingly sign the other two.⁶² The court upheld invalidation of 64,463 of the 125,609 total signatures collected by these circulators, which resulted in the decertification of all three initiatives from the statewide ballot.⁶³ The court reasoned that this was necessary to protect the careful initiative requirement adopted by the legislature:

We acknowledge that many voters feel strongly that they should have the opportunity to vote on one or more of these initiatives, and that these people will feel disenfranchised by our decision. This is extremely regrettable. The fact remains, however, that if the initiative process is to remain viable and retain its integrity, those invoking it must comply with the laws passed by our Legislature.⁶⁴

⁶⁰ *Montanans for Justice v. State ex rel. McGrath*, 146 P.3d 759, 773-75 (Mont. 2006). Montana Code Annotated § 13-27-302 lists the requirements of circulator affidavits. One of those requirements is that the circulator list the address of the petition signature gatherer. In *Montanans for Justice*, the 43 out-of-state circulators at issue in that case used false or fictitious addresses in Montana in their circulator affidavits. *Id.* at 773. "[S]ome of the provided addresses were hotels, retail stores or shopping centers; some were apartment complexes or personal residences at which the signature gatherer was not listed as a resident, and some addresses simply did not exist." *Id.* at 773.

⁶¹ *Id.* at 770-73.

⁶² *Id.* at 775-76.

⁶³ *Id.* at 771 & n.4.

⁶⁴ *Id.* at 778.

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OPPOSITION TO MOTION TO DISMISS AND REPLY IN SUPPORT OF MOTION
TO CHARACTERIZE CASE AS NON-ROUTINE

RESOURCE DEVELOPMENT COUNCIL, INC. ET AL. V. FENUMAI AND DIVISION OF ELECTIONS
CASE NO. 3AN-20-05901 CI

PAGE 18 OF 31

EXC 060

000415

The Montana Supreme Court expressly considered and rejected the holding of the Missouri Supreme Court in *United Labor Committee of Missouri v. Kirkpatrick*—cited by State Defendants in this case—that so long as the state can verify the veracity of the authenticity of subscription signatures, the petition should not be invalidated regardless of the conduct of the circulators.⁶⁵

The Oklahoma Supreme Court has ruled in accord with the cases above. In *In re Initiative Petition No. 379, State Question No. 726*,⁶⁶ that court struck all signatures (57,850 in total) gathered by circulators employed by a Nevada petition company, National Voter Outreach (“NVO”), in support of a citizen taxpayer bill of rights initiative. Those circulators falsely stated in their affidavits that they were “a qualified elector of the State of Oklahoma” when none of them were even Oklahoma residents.⁶⁷ The court reasoned that the Oklahoma legislature’s enactment of criminal sanctions for false circulator affidavits (punishable by up to \$1,000.00 and a year in county jail) made invalidation of all signatures gathered by those circulators the appropriate remedy.⁶⁸ Far from disenfranchising voters, that remedy upholds the integrity of the initiative process enacted in law:

Excluding all petitions associated with the [] initiative does not disenfranchise voters. Rather, it upholds the integrity of the initiative process that has been undermined by criminal wrongdoing and fraud. The

⁶⁵ *Id.* at 770.

⁶⁶ *In re Initiative Petition No. 379, State Question No. 726*, 155 P.3d 32 (Okla. 2006).

⁶⁷ *Id.* at 47-48.

⁶⁸ *Id.* at 41-42.

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Legislature has imposed strong sanctions for such wrongdoing. NVO and its out-of-state circulators committed much more than mere technical violations of Oklahoma law—they attempted to destroy the safeguards by which signatures are obtained and verified. Nothing less than the strong sanction of voiding the entire petition will serve to deter similar activity in the future and to protect the precious right of the initiative to Oklahoma voters.⁶⁹

Because the voiding of all petitions supported by false circulator affidavits reduced the number of qualified subscribers below the required threshold, the court ruled “the petition fails for numerical insufficiency.”⁷⁰

In 2016, the Arkansas Supreme Court invalidated 1,040 voter subscriptions and ordered the initiative stay off the election ballot because circulators did not disclose, prior to gathering signatures, that they were getting paid to collect signatures. In *Benca v. Martin*, an Arkansas statute required paid circulators to submit an affidavit to the secretary of state *prior* to gathering subscriptions.⁷¹ The same statute admonished: “[s]ignatures incorrectly obtained or submitted under this section shall not be counted by the Secretary of State.”⁷² Several circulators collected valid signatures but did so before they filed their affidavits with the secretary of state.⁷³ Like the state officials in this case, the Arkansas secretary of state refused to invalidate the otherwise valid signatures of Arkansas voters

⁶⁹ *Id.* at 49-50.

⁷⁰ *Id.* at 50.

⁷¹ *Benca v. Martin*, 500 S.W.3d 742 (Ark. 2016).

⁷² *Id.* at 748-49.

⁷³ *Id.* at 748.

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who were in favor of putting the legalization of medical marijuana on the ballot.⁷⁴ Arkansas lawyer Kara Benca sued the Secretary of State to invalidate the petitions.⁷⁵

The Arkansas Supreme Court granted Benca's petition and invalidated enough subscriptions to keep the initiative off the ballot. The court noted that the statutory language was mandatory that the secretary of state "shall not" count subscriptions incorrectly obtained or submitted.⁷⁶ Therefore, the court ruled that the initiative lacked the sufficient number of valid subscriptions, and issued a mandate that the secretary of state keep the medical marijuana initiative off the upcoming ballot.⁷⁷

C. State Defendants' Passing References to the Free-Speech Principles and Distinguishable Caselaw is Unpersuasive.

State Defendants end their motion to dismiss with passing references to free speech principles and Alaska cases involving much different situations than whether subscriptions to a petition supported by false circulator affidavits should be counted by the lieutenant governor. None of these arguments are persuasive or provide a means to ignore the plain language of Alaska statutes.

1. *North West Cruiseship Association v. State* helps, not undermines, Plaintiffs' claims.

North West Cruiseship Association of Alaska, Inc. v. State does not answer the

⁷⁴ *Id.* at 744.

⁷⁵ *Id.*

⁷⁶ *Id.* at 748-49.

⁷⁷ *Id.* at 744, 750.

question at issue in this case. That case involved challenges to subscriber signatures on a petition on four grounds. First, AS 15.45.120 requires each subscriber to be a registered Alaska voter *at the time they sign the petition*, but the petition booklets printed by the Division of Elections lacked a spot for subscribers to date their signatures. During its review of the petitions, the Division only counted signatures of individuals who were registered as of the date the petition booklet was filed. Cruise ship groups challenged all of the subscriptions, arguing the Division had no way of verifying that any subscriber was a registered voter at the time he or she signed the petition.⁷⁸ The Court reasoned that while the Division's method of auditing the signatures "may have been somewhat imprecise, in that a subscriber's voting registration status could only be verified as of the date the petitions were filed, the audit was nevertheless reasonable given that there was no statutory requirement that each signature be dated at the time of the audit."⁷⁹ Importantly, the Court made clear that its "analysis would be different had the legislature affirmatively required the signatures to be individually dated."⁸⁰

Second, the circulator affidavits were self-certified by the circulators instead of by notary publics, and did not include the location of self-certification and included petitions that were circulated in Anchorage where public notaries were typically available.⁸¹ The

⁷⁸ *North West Cruiseship Ass'n of Alaska, Inc. v. State*, 145 P.3d 573, 576-77 (Alaska 2006).

⁷⁹ *Id.* at 576-77.

⁸⁰ *Id.* at 577.

⁸¹ *Id.* at 578.

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Court reasoned that nothing prohibited a circulator from self-certifying his or her own circulator affidavit in Anchorage or anywhere else in the state, and the failure to include the location of the self-certification was a technicality that did not affect the sworn nature of the affidavit: "Because the failure to provide a place of execution is a technical deficiency that does not impede the purpose of the certification requirement, we conclude the petition booklets should not be rejected on these grounds."⁸²

Third, the cruise ship plaintiffs challenged the Division's failure to reject the subscriptions contained in petition booklets that did not include on each page the "paid by" information required by a now-defunct statute.⁸³ Circulators submitted 254 petition booklets containing subscriptions.⁸⁴ Two of those petition booklets each had one page that did not include the "paid by" information, and all other pages in these two petition booklets contained the proper disclosure.⁸⁵ The Division rejected all signatures contained on the two pages that did not include the "paid by" disclosure, but the plaintiffs sought to invalidate those two booklets in their entirety.⁸⁶ The Court approved of the Division's method, stating that by only excluding the otherwise valid signatures on pages that lacked the disclosure, the Division "struck a careful balance between the people's right to enact legislation by initiative and the regulations requiring that potential petition subscribers be

⁸² *Id.* at 577-78.

⁸³ *Id.* at 578.

⁸⁴ *Id.* at 576.

⁸⁵ *Id.* at 578.

⁸⁶ *Id.*

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made aware that the circulators may have a motivation to induce them to sign the petition other than a personal belief in the value of the initiative.”⁸⁷ It is in this context of affirming the Division's rejection of otherwise valid subscriptions on pages of the petition that lacked the required disclosure but counting the subscriptions on the other pages of the petition booklets that included the “paid by” disclosure that the Court quoted its prior directive to the Division to interpret its regulations in a way that “avoids the wholesale disenfranchisement of qualified electors.”⁸⁸ In other words, qualified subscriptions should be disqualified only if they could have been affected by the failure to lawfully disclose who paid the circulator.

Finally, the Court upheld the Division's counting of subscriptions that lacked the subscriber's physical residence address, as required by a Division regulation and not required by statute. The Court reasoned that while these subscribers failed to include their physical address, they all included their mailing address, their voter registration number, or social security number, and this information was sufficient for the Division to confirm they were qualified voters.⁸⁹

None of *North West Cruiseship Association's* holdings undermine Plaintiffs' claim in this case. To the contrary, the Court approved the invalidation of otherwise valid subscriptions because of circulator *negligence*, which should counsel this Court to rule that

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

invalidation of otherwise valid subscriptions is appropriate in the instance of circulator *criminal misconduct*, as is the case here. In *North West Cruiseship Association*, the Division of Elections properly rejected all subscriptions on pages of the petitions that did not include the “paid by” disclosures required by statute despite them otherwise being valid subscriptions, and the Court rejected the plaintiffs' attempts to turn technical violations into the wholesale invalidation of signature pages that did comply with the statute.⁹⁰ Here, like the Division's proper rejection of subscriptions on pages affected by circulators' failures to include information of who was paying him or her to collect the signatures, Plaintiffs seek to invalidate signatures because of criminal misconduct by signature gatherers.

Based on publicly available information of how much circulators hired to collect signatures in favor of 19OGTX were paid, which is described in detail in Plaintiffs' Complaint, it is likely that the professional out-of-state circulators working for Advanced Micro Targeting were unlawfully paid in excess of \$1 per signature for the collection of signatures,⁹¹ and that they falsified their circulator affidavits supporting their petitions to state they did not receive unlawful pay for the collection of subscriptions.⁹² Plaintiffs' claim goes to the heart of the signature gathering effort in support of 19OGTX and the proper remedy—as supported by the *North West Cruiseship Association* Court's approval

⁹⁰ *Id.*

⁹¹ AS 15.45.110(c).

⁹² AS 15.45.130(6).

of the Division's rejection of all subscriptions on pages that lacked the disclosure information—is the invalidation of all signatures affected by the circulator's unlawful conduct. That is, all of the signatures supported by a fraudulent circulator affidavit.

2. Invalidation of all subscriptions supported by a false circulator affidavit promotes the integrity of the initiative process and does not undermine free-speech.

State Defendants are wrong that invalidation of petition subscriptions supported by a false circulator affidavit would “thwart voters' constitutional right to propose and enact initiatives through no fault of their own”⁹³ Several courts have rejected this precise argument. Rather than thwarting voter rights, a court that upholds the requirement that circulators provide truthful affidavits is protecting the integrity of the initiative process itself.

The Montana Supreme Court reasoned that while it was “regrettable” that some voters would feel disenfranchised, the fact remained “that if the initiative process is to remain viable and retain its integrity, those invoking it must comply with the laws passed by our Legislature. We can neither excuse nor overlook violations of these laws, for to do so here would confer free reign for others to do so in other matters. We must enforce the law as written and as the Legislature intended.”⁹⁴

The Maine Supreme Court likewise reasoned “the circulator's role in a citizens' initiative is pivotal. Indeed, the integrity of the initiative and referendum process in many

⁹³ State Defendants' Motion to Dismiss, at 3.

⁹⁴ *Montanans for Justice v. State ex rel. McGrath*, 146 P.3d 759, 778 (Mont. 2006).

ways hinges on the trustworthiness and veracity of the circulator.”⁹⁵ Therefore a false circulator affidavit “justif[ies] the invalidation of the petition *in toto*.”⁹⁶

The Alaska Supreme Court decisions cited by State Defendants⁹⁷ are distinguishable and do not support their position that invalidating initiative subscriptions would be an affront to Alaska election law and disenfranchise voters. *Miller v. Treadwell*⁹⁸ was regarding misspelled write-in votes for Senator Lisa Murkowski in the 2010 general election, and not whether circulators had been unlawfully induced by pay in excess of the statutory maximum to collect signatures to get an initiative on the general ballot. The Court ultimately upheld inclusion of write-in votes that misspelled Senator Murkowski's name based on “voter intent” and its caselaw that has “consistently construed election statutes in favor of voter enfranchisement.”⁹⁹ Here, however, the issue is not voter disenfranchisement, as no vote has taken place, but rather whether the circulators unlawfully procured the required subscriptions to put the issue to a vote of the public. Upholding requirements for ballot access does not disenfranchise any voter; it upholds the integrity of the initiative process so it may endure and be trusted by the public.

⁹⁵ *Maine Taxpayers Action Network v. Secretary of State*, 795 A.2d 75, 80 (Me. 2002).

⁹⁶ *Id.* The Court was bolstered in this conclusion by the fact that the Maine Legislature considered a false statement in a circulator affidavit “to be a sufficiently grave act that it has specifically criminalized the providing of a false statement in connection with a petition.” *Id.* at 81 (citing 21-A M.R.S.A. § 904 (1993)).

⁹⁷ State Defendants' Motion to Dismiss, at 9-10.

⁹⁸ *Miller v. Treadwell*, 245 P.3d 867 (Alaska 2010).

⁹⁹ *Id.* at 870.

*Willis v. Thomas*¹⁰⁰ involved the Division of Election's inclusion of two voters' ballots in a general-election recount for a state senate seat even though the Division's records reflected they were not registered to vote because both had filled out and submitted the voter registration paperwork but local officials failed to forward these registrations to the Division before the election. The Court reasoned that these individuals should not have their actual votes disqualified because of the negligence of local officials.¹⁰¹ Again, this case involved actual votes and not subscriptions for a petition to reach the ballot collected by a circulator unlawfully induced to gather subscriptions.¹⁰²

The Alaska Supreme Court ballot initiative cases cited by State Defendants are likewise unhelpful to them. In *Yute Air Alaska v. McAlpine*,¹⁰³ the Court was tasked with determining whether the substance of an initiative violated the Alaska Constitution's one-subject rule. The Court refused to overrule its prior precedent on what constituted single-subject legislation and strike the initiative down. Stare decisis counseled in favor of upholding that prior precedent because it was not clear that a different standard would be more workable, the sponsors relied on the Court's caselaw in drafting the initiative, and

¹⁰⁰ *Willis v. Thomas*, 600 P.2d 1079, 1086-87 (Alaska 1979).

¹⁰¹ *Id.* at 1087.

¹⁰² The same is true of *Fischer v. Stout*, 741 P.2d 217 (Alaska 1987). In that case, Victor Fischer was a candidate for a state senate seat and lost the initial ballot count on election day by 15 votes. He demanded a recount. The Court ultimately upheld the election of Fischer's opponent, and in the course of doing so, ordered a handful of absentee votes to be counted that were originally rejected as submitted by a non-registered voter because those individuals had submitted the proper paperwork but the Division had not received it or lost it. *Id.* at 223-24.

¹⁰³ *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173 (Alaska 1985).

because the issue involved the initiative process, an act of direct democracy, the Court preferred to keep its liberal standard for finding an initiative conforms to the single-subject rule.¹⁰⁴ Here, there is no stare decisis for this Court to consider, as Plaintiffs and State Defendants agree that the appropriate remedy for false circulator affidavits is a matter of first impression in Alaska.¹⁰⁵ The closest precedent—*North West Cruiseship Association*—confirms that the Division of Elections has invalidated, and the Alaska Supreme Court has approved, otherwise valid voter subscriptions on petition pages where the circulator neglected to include the “paid by” disclosures. Here, Plaintiffs ask for that same remedy for criminal misconduct by signature gatherers in lying about how much they were paid for the collection of signatures. Moreover, here, Plaintiffs have not asked the Court to rule that the substance of 19OGTX is unconstitutional, thereby foreclosing the electorate from ever considering the substance of 19OGTX as a ballot initiative. Rather, Plaintiffs have asked the Court to uphold the integrity of the process proponents are statutorily required to follow to gain access to the ballot. These crucial differences distinguish this case from *Pullen v. Ulmer*,¹⁰⁶ *Planned Parenthood of Alaska v.*

¹⁰⁴ *Id.* at 1180-81.

¹⁰⁵ See Motion to Characterize Action as Non-Routine, at 5; State Defendants' Motion to Dismiss, at 2.

¹⁰⁶ *Pullen v. Ulmer*, 923 P.2d 54, 58 (Alaska 1996) (noting the rule that when analyzing the substance of an initiative that the court is to “construe voter initiatives broadly so as to preserve them whenever possible.”).

Campbell,¹⁰⁷ and *Boucher v. Engstrom*,¹⁰⁸ which are also cited by State Defendants.

None of these cases by the Alaska Supreme Court support State Defendants' argument that this Court should permit circulators who were unlawfully paid in excess of the statutory maximum to have the signatures they have unlawfully collected count toward ballot access. *North West Cruiseship* supports Plaintiffs' requested remedy.

IV. CONCLUSION

For the foregoing reasons, this Court should deny State Defendants' Motion to Dismiss this lawsuit. Plaintiffs' Complaint meets the low threshold to survive a motion to dismiss because it has alleged "a set of facts consistent with and appropriate to some enforceable cause of action."¹⁰⁹ Specifically, Plaintiffs' Complaint alleges that circulators hired by Advanced Micro Targeting were unlawfully paid in excess of \$1 per signature, for the collection of signatures,¹¹⁰ and lied about their pay in a sworn affidavit that certified the petition(s) submitted to the lieutenant governor. AS 15.45.130 prohibits the lieutenant governor from counting any subscriptions that are not "properly certified" when they are filed. Plaintiffs' Complaint asks the Court, consistent with *North West Cruiseship*

¹⁰⁷ *Planned Parenthood of Alaska v. Campbell*, 232 P.3d 725, 729 (Alaska 2010) (same).

¹⁰⁸ *Boucher v. Engstrom*, 528 P.2d 456, 462 (Alaska 1974) (same).

¹⁰⁹ *Larson v. State, Dept. of Corrections*, 284 P.3d 1, 6 (Alaska 2012) (quoting *Guerrero v. Alaska Hous. Fin. Corp.*, 6 P.3d 250, 253-54 (Alaska 2000)); see also *Odom v. Fairbanks Memorial Hospital*, 999 P.2d 123, 128 (Alaska 2000).

¹¹⁰ AS 15.45.110(c).

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Association, to apply AS 15.45.130 and invalidate all subscriptions contained in petition booklets supported by false circulator affidavits.

DATED at Anchorage, Alaska this 12th day of May, 2020.

HOLLAND & KNIGHT LLP
Attorneys for Plaintiffs

By: /s/Matthew Singer
Matthew Singer
Alaska Bar No. 9911072

By: /s/Lee C. Baxter
Lee C. Baxter
Alaska Bar No. 1510085

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of May, 2020, a true and correct copy of the foregoing was served by email upon the following:

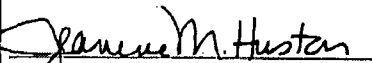
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Jeanne M. Huston

OPPOSITION TO MOTION TO DISMISS AND REPLY IN SUPPORT OF MOTION
TO CHARACTERIZE CASE AS NON-ROUTINE
RESOURCE DEVELOPMENT COUNCIL, INC. ET AL. V. FENUMIAI AND DIVISION OF ELECTIONS
CASE NO. 3AN-20-05901 CI

PAGE 31 OF 31

EXC 073

000428

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FILED in the TRIAL COURTS
STATE OF ALASKA, THIRD DISTRICT

MAY 18 2020

Clerk of the Trial Courts

By _____ Deputy

Attorneys for Defendant Vote Yes for
Alaska's Fair Share

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

RESOURCE DEVELOPMENT COUNCIL)
FOR ALASKA, INC.; ALASKA TRUCKING)
ASSOCIATION, INC.; ALASKA MINERS)
ASSOCIATION, INC.; ASSOCIATED)
GENERAL CONTRACTORS OF ALASKA;)
ALASKA CHAMBER; ALASKA SUPPORT)
INDUSTRY ALLIANCE,)

Plaintiffs,)

v.)

KEVIN MEYER, in his official capacity)
as Lt. Governor of the State of Alaska;)
GAIL FENUMIAI, in her capacity as Director)
of the Alaska Division of Elections; the)
STATE OF ALASKA, DIVISION OF)
ELECTIONS; and VOTE YES FOR)
ALASKA'S FAIR SHARE,)

Defendants.)

5

Case No. 3AN-20-05901CI

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FAIR SHARE'S MOTION TO DISMISS
RDC v. Meyer, No. 3AN-20-05901 CI

May 18, 2020
Page 1 of 22

EXC 074

000326

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DEFENDANT VOTE YES FOR ALASKA'S FAIR SHARE'S MOTION TO DISMISS

Vote Yes for Alaska's Fair Share ("Fair Share"), by and through its counsel, Brena, Bell & Walker, P.C., has joined in the State Defendants' Cross-Motion to Dismiss, dated April 30, 2020, and supplements the arguments therein with the additional arguments below regarding the constitutionality and interpretation of Alaska's current restriction on payment per signature for petition circulators. In making this motion, Fair Share assumes that all the factual allegations in the Complaint are true.¹

I. SUMMARY OF POSITION

Plaintiffs are asking this Court to disenfranchise 39,149 Alaskan voters and bar the Fair Share Act initiative from the ballot. At the core of Plaintiffs' position is their assertion that the petition certifications, which on their face were properly done, contain inaccurate information regarding the petition circulators' residency and payment. Remarkably, Plaintiffs do not allege a single signature verified by the Division of Elections was not a valid signature of an Alaskan voter. Nor do Plaintiffs allege a single signature was gathered dishonestly or through fraud. Similarly, Plaintiffs do not allege a single petition circulator made an inappropriate or untruthful comment while circulating the Fair Share Act petition. Indeed, under circumstances

¹ Due to the expedited filings in this matter and uncertainty regarding apparent service deficiencies, whether the State Defendants had appeared and what position the State was taking on the complaint, Fair Share was not able to complete its motion prior to the standard deadline for filing an answer. However, Fair Share has joined with the State's cross-motion to dismiss and agrees there are no material facts that will alter the dispositive legal issues in this matter. Fair Share requests that the Court treat this motion to the extent required as for judgment on the pleadings under Civil Rule 12(c) or summary judgment under Civil Rule 56.

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similar to this case, Plaintiffs have not brought forward a single case in which a court has chosen to disenfranchise voters or block an initiative from the ballot.

Despite a dearth of authority supporting their legal positions under circumstances similar to this case, Plaintiffs bring this legal action suggesting they do so out of concern for the integrity of the initiative process.² However, nothing in Plaintiffs' allegations suggest the integrity of the Fair Share Act initiative process is at risk. Plaintiffs' feigned concern for the integrity of the initiative process was notably absent when the same petition circulators were paid to assist with a second and unrelated initiative submitted earlier than the Fair Share initiative. Plaintiffs' concern was also notably absent when the same petition circulators were paid to assist with a third and unrelated initiative two years ago. Candor would suggest Plaintiffs' concern is not with the initiative process at all but rather with the substance of the Fair Share Act itself—a concern best left to the ballot box in a democracy rather than to the courts.³

² Perhaps Plaintiffs make this suggestion as explanation for why are they bringing this legal action when they lack any direct financial interest in the Fair Share Act, which only applies to three major oil producers. Indeed, Plaintiffs' Alaskan members would actually stand to benefit along with the Alaskan economy when the Fair Share Act passes and \$1 billion per year more of the wealth generated from our oil remains in Alaska.

³ Three major oil producers will be directly impacted by the Fair Share Act. They would have to pay roughly \$1 billion per year more in production taxes and would have to reveal their profits for our three largest and most profitable oil fields (the Prudhoe Bay Unit, Kuparuk River Unit, and the Colville River Unit). Plaintiffs' concern for the impacts of the Fair Share Act on the three major producers for whom they are acting as surrogates far better explain Plaintiffs' actions than their feigned concern for the initiative process.

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Before turning to the underlying statutes and their proper interpretation, this Court should place the issues before it within a proper constitutional framework. As interpreted by Plaintiffs, the underlying statutes severely burden the constitutional rights of Alaskans and petition circulators to engage in political speech. Statutes that create such a burden are subject to strict scrutiny and are narrowly construed so as not to unnecessarily intrude into fundamental constitutional rights. In fact, the constitutional protection afforded political speech has repeatedly been held to be “at its zenith” when applied to petition circulators because their activities are considered “core political speech,” involving “interactive communication concerning political change.”⁴ Plaintiffs' strained and expansive interpretations of the underlying statutes wither quickly under proper constitutional scrutiny and rules of construction.

Plaintiffs' first novel theory is that the residency of the petition circulators may support Plaintiffs' efforts to disenfranchise Alaskan voters and keep a certified initiative off the ballot.⁵ It does not. Paradoxically, while Plaintiffs' make factual allegations concerning the state of residency in the factual background of their Complaint, they do not refer to it again or use it in their counts or prayer for relief. Plaintiffs' intuition is correct not to suggest that the state of

⁴ *Nader v. Brewer*, 531 F.3d 1028, 1035 (9th Cir. 2008).

⁵ Plaintiffs' Complaint at 4 (“Alaska law prohibits payment in excess of \$1 per signature gatherer. The same statute requires that signature gatherers must be Alaska citizens. These reasonable requirements were intended to protect Alaska's ballot initiative process from the corrupting influence of outside interests and to assure that ballot initiatives have the support of Alaskans.”)

residency of the petition circulator may be a basis for disregarding the verified signatures of Alaskan voters. Residency in Alaska is not required for petition circulators under the Alaska Constitution. While AS 15.45.105(3) does purport to require the petition circulator be an Alaskan resident, the petition certification makes no mention of this requirement and only requires a petition circulator to certify that she is "a citizen of the United States." The language on the petition certification is consistent with all relevant legal authority that has held for some time that requiring petition circulators to be residents of the state in which they are circulating a petition is an undue burden on their constitutional rights to engage in political speech.⁶ Since Plaintiffs have not alleged that any petition circulator is not a citizen of the United States, there can be no factual dispute in this case that the petition circulators did not properly verify residency on the petition certification.

Plaintiffs' second novel theory is that the compensation of the petition circulators may support Plaintiffs' efforts to disenfranchise Alaskan voters and keep a certified initiative off the ballot.⁷ It does not. The leading case in this area concerned a limitation by Colorado on

⁶ *Nader*, 531 F.3d at 1035-38 (citing *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 194-95, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999)).

⁷ Plaintiffs' Complaint at 7-8 ("AS 15.45.130 provides, in relevant part, that in 'determining the sufficiency of the petition, the lieutenant governor may not count subscriptions on petitions not properly certified at the time of filing or corrected before the subscriptions are counted' . . . Many of the affidavits accompanying the 544 petition booklets by the individuals working for Advanced Micro Targeting to circulate petitions in support of 190GTX are false, and therefore not properly certified, because these individuals were paid in excess of \$1 per signature for the collection of signatures on the 190GTX petitions.").

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the use of paid petition circulators.⁸ In *Meyer*, the U.S. Supreme Court held it was a case involving a “limitation on political expression subject to exacting scrutiny” and that such a restriction violated the First Amendment rights of the petition circulators.⁹ In so holding, the Court expressly rejected the “State's interest in protecting the integrity of the initiative process” as a justification because the state had less intrusive means for protecting such an interest and because the Court was unwilling to accept that paid petition circulators, who depend upon their reputations for integrity for future assignments, were more likely to accept false signatures than volunteers.¹⁰

AS 15.45.110(c) limits per-signature payments to \$1 per signature. It does not address or limit any other form of payment to petition circulators. The sponsor of the statute was clear that, while he had originally intended to prohibit the per-signature payment out of concern for the *Meyer* decision, he chose to limit the per-signature payments to \$1 per signature.¹¹ In offering the statute, he was similarly clear that “[p]ayment would still be allowed by the hour or any other method.”¹² He also explained his concern for “bounty hunters” recovering payments on a per-signature basis.¹³

⁸ *Meyer v. Grant*, 486 U.S. 414, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988).

⁹ *Meyer*, 486 U.S. at 420-28.

¹⁰ *Meyer*, 486 U.S. at 425-28.

¹¹ Exhibit 1, Tr. 21:3-11 (Alaska Senate Judiciary Committee, March 18, 1998).

¹² Exhibit 1, Tr. 21:4-5.

¹³ Exhibit 1, Tr. 20:19-21.

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Given its clear language and legislative history, AS 15.45.110(c) may only reasonably be read to limit payments to petition circulators to \$1 per signature. It may not reasonably be read to also limit other forms of payment to petition circulators. There is simply no language in AS 15.45.110(c) that restricts any other form of payment to petition circulators including payments made “per hour,” “per week,” or “per month.”

For their part, Plaintiffs ignore a narrow reading of AS 15.45.110(c) and conflate per-signature payment with every other form of payment. Then, Plaintiffs' juxtapose the \$1 per signature limitation onto every other form of payment. Plaintiffs' broad reading of AS 15.45.110(c) and their juxtaposition of the per-signature limitation onto every other form of payment is not found in the plain reading of the statute, is inconsistent with its legislative history, and does not survive the constitutional requirement that restrictions to political speech be narrowly construed to avoid encroachment into the constitutional rights of citizens.

This distinction between per-signature payment and other forms of payment is important to this case because Plaintiffs have not alleged facts to show that any petition circulators received per-signature payments at all. In fact, Plaintiffs allege petition circulators were paid a monthly salary.¹⁴ On its face, payment of a monthly salary is not a per-signature payment and does not violate the \$1-per-signature limitation on payments set forth in AS 15.45.110(c).

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¹⁴ Plaintiffs' Complaint at 5 (“Advanced Micro Targeting offered to pay an amount that is greater than \$1 per signature for the collection of signatures on a petition by advertising that it would pay signature gatherers \$3,500 - \$4,000 per month plus bonus, and that it expected 80-100 signatures per day, six days per week in return for such compensation.”)

Plaintiffs' third novel theory is that the certification affidavit required in AS 15.45.130 may support Plaintiffs' efforts to disenfranchise Alaskan voters and keep a certified initiative off the ballot.¹⁵ It does not. There is no factual dispute in this case as to whether the petitions at issue contained the affidavits required by AS 15.45.130, which on their face were properly done. Plaintiffs' seize on the requirement that the petitions must be "properly certified at the time of filing" in an effort to convert a ministerial act into a new forum for the litigation of a criminal matter before the lieutenant governor. Nothing in AS 15.45.130 or in any of the statutes governing the initiative process anticipates such a broad reach for the simple act of checking the certifying affidavits against the list of statutory requirements.

In fact, other statutes in AS 15.45 suggest such a reading of AS 15.45.130 is inconsistent with the entire statutory scheme governing the initiative process. AS 15.45.110(e) provides criminal consequences for violations of the initiative process. AS 15.45.120 provides that a voter may withdraw his signature before the petition is filed. AS 15.45.140 sets exacting signature requirements to ensure robust numeric and geographic participation throughout the house districts of Alaska. AS 15.45.150 limits the lieutenant governor's review of a petition to "not more than 60 days." And, AS 15.45.160 specifies the bases for the lieutenant governor to determine whether a petition was improperly filed. None of these governance statutes

¹⁵ Plaintiffs' Complaint at 4 ("Alaska law prohibits payment in excess of \$1-per-signature gatherer. The same statute requires that signature gatherers must be Alaska citizens. These reasonable requirements were intended to protect Alaska's ballot initiative process from the corrupting influence of outside interests and to assure that ballot initiatives have the support of Alaskans.")

anticipate or are consistent with Plaintiffs' broad reading of AS 15.45.130. In fact, in language or in concept, they all contradict such a broad reading.

Plaintiffs' fourth novel theory is that the appropriate remedy for its allegations are to disenfranchise Alaskan voters and keep a certified initiative off the ballot.¹⁶ It is not. Even assuming every allegation by Plaintiffs is true, there is no statutory or legal basis for the remedy Plaintiffs seek under the circumstances of this case. In fact, AS 15.45.110(e) specifically provides a remedy, and another less suitable remedy should not be cobbled together for the reasons well stated by the State. Assuming Plaintiffs' allegations are true, there is no justice in disenfranchising 39,149 Alaskan voters and barring the Fair Share Act from the ballot merely because of the misbehavior of petition circulators on a certification. If there was misbehavior, the people responsible for the misbehavior should bear the consequences of it and not the entire State of Alaska.

In short, assuming Plaintiffs' factual allegations are correct, Plaintiffs' case fails because their interpretations of the underlying statutes are simply wrong. Properly interpreted with Plaintiffs' factual allegations assumed correct, not a single petition certification contained inaccurate information. Assuming further Plaintiffs' interpretations of the underlying statutes are somehow correct, Plaintiffs' case fails because the underlying statutes would be an

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¹⁶ Plaintiffs' Complaint at 7-8 ("AS 15.45.130 provides, in relevant part, that in 'determining the sufficiency of the petition, the lieutenant governor may not count subscriptions on petitions not properly certified at the time of filing or corrected before the subscriptions are counted' . . . Many of the affidavits accompanying the 544 petition booklets by the individuals working for Advanced Micro Targeting to circulate petitions in support of 190GTX are false, and therefore not properly certified, because these individuals were paid in excess of \$1 per signature for the collection of signatures on the 190GTX petitions.").

unconstitutional infringement on the rights of Alaskans and petition circulators to participate in political speech within our democracy. Finally, assuming further that the underlying statutes are not an unconstitutional infringement on the rights of Alaskans and petition circulators, Plaintiffs' case fails because they are not entitled to the remedy of disenfranchising 39,149 Alaskan voters and barring the Fair Share Act initiative from the ballot because the petition certifications, which on their face were properly done, contain inaccurate information regarding the petition circulators' residency and payment.

II. FACTS

Fair Share joins and incorporates by this reference the statement of facts on pages 4-5 of the State's Cross-Motion to Dismiss.

III. STANDARD FOR GRANTING A MOTION TO DISMISS

Fair Share joins and incorporates by this reference the standard on page 5 of the State's Cross-Motion to Dismiss.¹⁷ Plaintiffs have failed to state a claim upon which relief can be

¹⁷ Alternatively, Civil Rule 56 provides that summary judgment shall be entered in favor of the moving party "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." To succeed on summary judgment, a movant must show that there are no genuine issues of material fact, and the movant is entitled to judgment as a matter of law. *Zeman v. Lufthansa German Airlines*, 699 P.2d 1274, 1280 (Alaska 1985). In determining whether there is a genuine issue of material fact, "[a]ll reasonable inferences of fact from proffered materials must be drawn against the moving party . . . and in favor of the non-moving party." *Sea Lion Corp. v. Air Logistics of Alaska, Inc.*, 787 P.2d 109, 116 (Alaska 1990). Once the moving party meets its burden of establishing the absence of any material facts, the non-moving party must set forth specific facts showing that it could produce evidence "reasonably tending to dispute or contradict the movant's evidence and thus demonstrate that a material issue of facts exists." *State of Alaska, Dep't of Highways v.*

granted, because they misconstrue the duties of the lieutenant governor under AS 15.45.130 and the express criminal remedy for violation of AS 15.45.110(c) provided under AS 15.45.110(e) and also advance an interpretation of AS 15.45.110(c) that is contrary to the legislative intent of the statute and an unconstitutional restriction on free speech. No materials outside the pleadings and the public record are necessary to decide this case.

IV. DISCUSSION

A. Plaintiffs' broad interpretation of AS 15.45.110(c) restricting all forms of compensation for petition circulators would be an unconstitutional restriction on free speech.

The Complaint alleges "Advanced Micro Targeting offered to pay an amount that is greater than \$1 per signature for the collection of signatures on a petition by advertising that it would pay signature gatherers \$3,500 - \$4,000 per month plus bonus and that it expected 80-100 signatures per day, six days per week in return for such compensation."¹⁸ Taking this allegation regarding a non-party as true, Plaintiffs are not alleging any circulators were compensated on a *per-signature* basis in an amount greater than \$1 per signature, but rather they were compensated in amounts that, when divided by the number of signatures they were expected to gather or actually gathered, resulted in being paid more than \$1 per signature. As

Green, 586 P.2d 595, 606 n.32 (Alaska 1978). Mere assertions of fact in pleadings and memoranda are insufficient to deny summary judgment. *Brock v. Rogers & Babler, Inc.*, 536 P.2d 778, 783 (Alaska 1975). Courts apply their "independent judgment to questions of law, adopting 'the rule of law most persuasive in light of precedent, reason, and policy.'" *Planned Parenthood*, 232 P.3d at 729 (quoting *Jacob v. State, Dep't of Health & Soc. Servs.*, 177 P.3d 1181, 1184 (Alaska 2008)).

¹⁸ Complaint at 5 ¶ 22.

discussed below, this sweeping interpretation is not what a plain reading reveals or what the sponsor of the legislation intended, nor is it narrowly construed or founded upon the necessary compelling state interest to justify restricting political speech.

Fair Share notes that the Complaint also alleges that “Advanced Micro Targeting and/or Texas Petition Strategies paid to fly nonresident professional signature gatherers to Alaska, and also provided meals and lodging as additional compensation.”¹⁹ Yet Plaintiffs do not include violation of that statute within their counts. Perhaps Plaintiffs are aware that the U.S. Supreme Court and the Ninth Circuit have held such residency requirements for petition circulators are unconstitutional.²⁰ A review of why this is the law is instructive for the other statutory provisions Plaintiffs choose to advance before this Court.

In *Meyer v. Grant*, the U.S. Supreme Court held:

The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change. . . . Thus, the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as “core political speech.”²¹

The *Meyer* court decided that “Colorado's prohibition of paid petition circulators restricts access to the most effective, fundamental, and perhaps economical avenue of political

¹⁹ Complaint at 6 ¶ 23.

²⁰ *Nader v. Brewer*, 531 F.3d 1028, 1037-38 (9th Cir. 2008) (“We conclude that the state did not meet its burden of showing that this residency requirement is narrowly tailored to further the state's compelling interest in preventing fraud.”).

²¹ *Meyer v. Grant*, 486 U.S. 414, 421-22, 108 S.Ct. 1886, 100 L.Ed.2d 425).

discourse, direct one-on-one communication,” adding that “[t]he First Amendment protects appellees’ right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.”²² Because the Colorado statute “trench[e]d upon an area in which the importance of First Amendment protections is ‘at its zenith[,]’” the Court reasoned that “the burden that Colorado must overcome to justify this criminal law is well-nigh insurmountable.”²³ The Court then rejected Colorado’s policy arguments:

We are not persuaded by the State’s arguments that the prohibition is justified by its interest in making sure that an initiative has sufficient grass roots support to be placed on the ballot, or by its interest in protecting the integrity of the initiative process. As the Court of Appeals correctly held, the former interest is adequately protected by the requirement that no initiative proposal may be placed on the ballot unless the required number of signatures has been obtained.

The State’s interest in protecting the integrity of the initiative process does not justify the prohibition because the State has failed to demonstrate that it is necessary to burden appellees’ ability to communicate their message in order to meet its concerns. The Attorney General has argued that the petition circulator has the duty to verify the authenticity of signatures on the petition and that compensation might provide the circulator with a temptation to disregard that duty. No evidence has been offered to support that speculation, however, and we are not prepared to assume that a professional circulator—whose qualifications for similar future assignments may well depend on a reputation for competence and integrity—is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot.²⁴

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²² *Meyer v. Grant*, 486 U.S. at 424.

²³ *Id.* at 425.

²⁴ *Id.* at 425-26.

In *Prete v. Bradbury*,²⁵ the Ninth Circuit applied *Meyer* to an Oregon law prohibiting per-signature payment of initiative-petition circulators but not any other method of compensation.²⁶ The court considered the Eighth Circuit's decision upholding a ban on per-signature payments in North Dakota:

In *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614 (8th Cir. 2001), the Eighth Circuit distinguished North Dakota's prohibition on paying initiative-petition circulators "on a basis related to the number of signatures obtained" (i.e., the same type of restriction at issue here) from the complete prohibition on paid petition circulators in *Meyer*. In *Jaeger*, the court noted that the state had an "important interest in preventing signature fraud" in the initiative process, and that the state had supported that interest with evidence that paying petition circulators per signature encouraged such fraud. *Id.* at 618.

As in *Prete* and *Jaeger*, no state interest has been offered here to restrict compensation for signature gathering outside of the per-signature context. The *Prete* court emphasized that its application of less-than-strict scrutiny was only possible because the scope of the Oregon ban was limited to per-signature petition payments only.²⁷ The *Prete* court also noted that the Oregon ban "barr[ed] only payment of petition circulators on the basis of the number of signatures gathered" and did not "prohibit adjusting salaries or paying bonuses according to validity rates or productivity."²⁸

The interpretation of AS 15.45.110(c) suggested by Plaintiffs' Complaint is far from the limited scope of *Prete*. On the contrary, the notion of restricting *all* forms of compensation for

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²⁵ 438 F.3d 949 (9th Cir. 2006).

²⁶ *Prete*, 438 F.3d at 952.

²⁷ *Id.* at 963.

²⁸ *Id.* at 968.

petition circulators to an amount equal to \$1 per signature actually gathered—*de facto* banning all forms of compensation *other than* \$1 per signature—would impose the severe impact that the U.S. Supreme Court rejected in *Meyer*.

As previously discussed, Plaintiffs' interpretation forces a restricted per-signature compensation method upon petition circulators who are paid under other methods. Under these circumstances, both *Meyer* and *Prete* highlight the fatal constitutional flaws of Plaintiffs' broad interpretation in this case and would demand strict scrutiny of AS 15.45.110(c) to prevent unconstitutional infringement into the rights to political speech. Plaintiffs' broad interpretation would not survive such scrutiny.

It should also not be overlooked that *Prete* was decided in the era prior to the U.S. Supreme Court's landmark decision in *Citizens United v. Federal Election Comm'n* that narrowed the justifiable state interest in restricting political contributions to “actual quid pro quo corruption or its appearance.”²⁹ The Ninth Circuit has overturned some of Alaska's contribution limits in light of *Citizens United*, and the U.S. Supreme Court recently suggested that the circuit court may not have gone far enough in applying its precedent.³⁰ Thus, restrictions on the use of money as political speech continues to expand and would not permit Plaintiffs' broad interpretation of AS 15.45.110(c) to constitutionally stand.

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²⁹ *Citizens United*, 558 U.S. 310, 359-360, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010).

³⁰ *Thompson v. Hebdon*, 140 S.Ct.348, 350 (2019).

B. The legislative history of AS 15.45.110(c) shows that the statute should not apply to compensation methods other than per signature.

Senator Sharp, the sponsor of the bill creating AS 15.45.110(c), presented it as follows:

It's often assumed that persons obtaining signatures on a ballot initiative are volunteers who believe strongly in a cause, and in many cases that is true. But unfortunately, what is more often not the case. Instead, it is more likely that the solicitors are signature -- signature bounty hunters who are paid by the sponsor of the initiative. In an effort to bring an issue process back to a more grassroots effort, SB 313 . . . prohibits payment per signature by the sponsor. Payment would still be allowed by the hour or any other method. And the reason for that, Mr. Chairman, is that Leg Legal has said that, in the Lower 48 where they prohibited payments of any kind for obtaining signatures on an initiative, it was declared unconstitutional restraint of the process. But they do believe other states have at least prohibited payments by the signature, and that has stood up in court so far. So this proposed legislation would do that.³¹

The statute was drafted with the express purpose of countering "bounty hunters" who were compensated on a per-signature basis and not any other basis of compensation. In the House Finance committee, Chairman Therriault reemphasized the constitutional concerns surrounding the restriction:

And I believe when we left off there was a number of questions regarding court cases. There is a memo from Rick Glover in your file, plus, in addition, I spoke to AG today, attorney with the Department of Law. There are two Meyer (ph) cases. One of them has been to the Supreme Court which clearly stated that you cannot prohibit the payment for the gathering of signatures. It didn't specify whether you could limit the amount that you get paid for gathering signatures. So if we adopt language doing so, we're in a bit of a gray area.

I think where we left off, Representative Mulder had offered his amendment -- it was Amendment Number 1 -- which dealt with putting language into the bill that would allow you to pay per signature up to \$1 per signature, but it would cap it

³¹ Exhibit 1, Tr. 20:16 – 21:11.

at that amount. So I wanted to make it clear to individuals that that cap on the payment has not been found to be unconstitutional. An outright ban of any payment has been found to be unconstitutional.³²

Representative Davies underscored the sponsor's policy concern with "bounty hunter" circulators:

Mr. Chair, following the discussion that we had the last time we looked at this bill, one of the considerations was that -- one of the concerns, I think, that gives rise to this bill was the fact of people carrying this petitions [sic] being aggressive and kind of in your face and overly aggressive. And Mr. Chair, I believe that the existing language in here that's proposed in the bill that would limit the payment to an hourly rate or a salary or a flat fee or something like that, a daily fee or some approach, anything other than a per-signature approach, would move in the direction of a person being less aggressive, less in your face. In other words, if they're trying to get -- they're going to get paid by the piece and by each signature, they're going to be much more aggressive about going after every individual person out there than otherwise.³³

The sponsor's clear intent, the constitutional concerns, and the policy basis of the limitation on per-signature compensation weigh support interpreting AS 15.45.110(c) as being limited to per-signature payments in excess of \$1 per signature.³⁴ Frankly, Plaintiffs' broader interpretation would clearly be unconstitutional in light of the authorities discussed above.

The policy basis for limiting per-signature compensation for petition circulators is to remove the financial incentive for "bounty hunters" to deceive or otherwise coerce voters into

³² Exhibit 2, Tr. 75:1-11, 75:22-76:4 (Alaska House Finance Committee, May 8, 1998).

³³ Exhibit 2, Tr. 76:15-77:5.

³⁴ The House amendment removed express language in the proposed statute that made this even more clear, but the legislative history does not provide a clear rationale for this change.

signing their petitions. Plaintiffs' interpretation of AS 15.45.100(c) effectively converts all methods of compensating petition circulators to a per-signature method and would no longer align with the basic policy reasons supporting the restriction in the first instance. This Court should not interpret and apply AS 15.45.110(c) in a way that results in the opposite policy outcome of what it was intended to achieve and would be clearly unconstitutional.³⁵

C. Taking all the Complaint's factual allegations as true, the remedy for violation of AS 15.45.110(c) is not the disenfranchisement of tens of thousands of Alaskans who signed the certified initiative.

Fair Share agrees with, joins, and incorporates by this reference the compelling arguments on pages 6-13 of the State's Cross-Motion to Dismiss. At its core, Plaintiffs' Complaint attempts to impose a duty on the lieutenant governor that does not exist in the law and then use the supposed violation of that duty to throw out the certified signatures of tens of thousands of Alaskans, none of which have Plaintiffs' alleged as illegitimate. In determining whether there is "an insufficient number of subscribers" under AS 15.45.160, the lieutenant governor "may not count subscriptions on petitions not properly certified" under AS 15.45.130, but the statute expressly lists the requirements of the affidavit needed to deem the petition properly certified. Nowhere in the statutes is the lieutenant governor required to extend his ministerial duty into investigation and verification of each and every sworn statement made in the circulators' affidavits to deem them properly certified, and nowhere in the statutes is the

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³⁵ Fair Share does not believe the statute has been so enforced in the 22 years since its passage but that factual course of conduct goes beyond the scope of this motion.

falsity of such affidavits made a basis for excluding subscriptions on otherwise properly certified petitions.

Plaintiffs have previously relied upon a variety of non-Alaska cases that involve actual fraud or procedural misconduct without alleging anything more in this case than proper execution of affidavits including reference to a compensation statute that Plaintiffs' *interpret* as restricting all compensation to an unconstitutional degree (nearly all Plaintiffs' cases were also decided prior to *Meyer*, *Prete*, and/or *Citizens United*). Nothing that Plaintiffs have alleged or argued impacts the Alaska Supreme Court's clear holding that the requirements of AS 15.45.130 should be construed "only as broadly as is necessary to address the specific error" and "should avoid an interpretation that requires a broader remedy that disenfranchises voters who did nothing wrong."³⁶ The Court has recently affirmed a superior court order that "[t]he Alaska Constitution gives the voters great power to act independently of their elected officials" and declining to "restrict the voters' right to affirmatively take action to admonish or disapprove of an elected official's conduct in office as voters have a right to do so through the initiation, referendum, and recall process."³⁷ Even if Plaintiffs' overbroad and unconstitutional interpretation of AS 15.45.110(c) is upheld, the State has correctly argued they have failed to state a claim upon which relief can be granted because the remedy of disqualifying petitions is not available under AS 15.45.130 upon their allegations.

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³⁶ *North West Cruiseship Ass'n v. State*, 145 P.3d 573, 587 (Alaska 2006).

³⁷ *Dunleavy v. State*, 2020 WL 2115477 at *3, 9 (2020) (*affirmed by State Division of Elections v. Recall Dunleavy*, Sup. Ct. No. S-17706, Order of May 8, 2020).

V. CONCLUSION

Assuming the Plaintiffs' factual allegations are true, Plaintiffs' case fails as a matter of law on multiple levels. Plaintiffs' case fundamentally fails because their interpretations of the underlying statutes are simply wrong. When the underlying statutes are properly interpreted, this case may be resolved as a matter of law for multiple reasons.

When the residency requirement is properly interpreted and applied, Plaintiffs' case fails as a matter of law because the petition circulators meet the residency requirements. Plaintiffs' allegation that the petition circulators must be residents of Alaska is not a proper restriction on their constitutional rights to engage in political speech nor was Alaska residency required to be certified on the petition certification. Accordingly, Plaintiffs' case fails as a matter of law.

When the "per signature" payment limitation is properly interpreted and applied, Plaintiffs' case fails as a matter of law because the petition circulators did not enter into an agreement in violation of AS 15.45.110(c). AS 15.45.110(c) restricts payments to petition circulators to \$1 "per signature." It does not restrict "per hour," "per week," "per month," "salary" or any other type of payments to petition circulators nor would it be constitutionally permissible to apply such a restriction to other forms of payments. Plaintiffs' allegations are that the petition circulators were paid a monthly salary with an opportunity for bonuses and then they seek to improperly and unconstitutionally juxtapose the \$1 "per signature" restriction to petition circulators paid "per month." Accordingly, Plaintiffs' case again fails as a matter of law.

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When the certification requirement is properly interpreted and applied, Plaintiffs' case fails as a matter of law because the petition circulators properly certified the petitions under AS 15.45.130. The certification requirement in AS 15.45.130 requires a simple affidavit certification, which was provided in this case. AS 15.45.139 is not a spring board for the grand adjudicatory inquisition Plaintiffs so desperately seek to force upon the lieutenant governor and initiative sponsors. Plaintiffs' interpretation of AS 15.45.130 is contradicted by virtually every other statute in AS 15.45 governing the initiative process and would, if adopted by this Court, permit large well-financed industry interests to frustrate the very purposes underlying Alaskans' constitutional rights to pass laws directly through initiative without obstruction. Accordingly, Plaintiffs' case again fails as a matter of law.

Finally, even assuming this Court does not accept any of the legal interpretations of the underlying statutes at issue as advanced by Fair Share, Plaintiffs' case still fails as a matter of law because the remedy of disenfranchising 39,149 Alaskan voters is simply not available under the facts of this case. Plaintiffs have not alleged a single improper signature among the 39,149 the lieutenant governor verified as correct. The very idea that Alaskans would be disenfranchised and the Fair Share Act blocked from the ballot based on the untenable arguments advanced by Plaintiffs is repugnant to the constitutional rights of all Alaskans. Direct democracy through initiative is not perfect, but Plaintiffs' efforts to undermine it should not give this Court a moments pause when rejecting.

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RESPECTFULLY SUBMITTED this 18th day of May, 2020.

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Counsel for Defendant Vote Yes for Alaska's
Fair Share

By //s// Robin O. Brena
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Certificate of Service

I hereby certify that a true and correct
copy of the foregoing document
was served by e-mail upon
the following this 18th day of May 2020.

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FAIR SHARE'S MOTION TO DISMISS
RDC v. Meyer, No. 3AN-20-05901 CI

May 18, 2020
Page 22 of 22

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

RESOURCE DEVELOPMENT COUNCIL)
FOR ALASKA, INC.; ALASKA TRUCKING)
ASSOCIATION, INC.; ALASKA MINERS)
ASSOCIATION, INC.; ASSOCIATED)
GENERAL CONTRACTORS OF ALASKA;)
ALASKA CHAMBER; ALASKA SUPPORT)
INDUSTRY ALLIANCE,)

Plaintiffs,)

v.)

KEVIN MEYER, in his official capacity)
as Lt. Governor of the State of Alaska;)
GAIL FENUMIAI, in her capacity as Director)
of the Alaska Division of Elections; the)
STATE OF ALASKA, DIVISION OF)
ELECTIONS; and VOTE YES FOR)
ALASKA'S FAIR SHARE,)

Defendants.)

Case No. 3AN-20-05901CI

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ORDER GRANTING FAIR SHARE'S MOTION TO DISMISS
RDC v. Meyer, No. 3AN-20-05901 CI

Page 1 of 3

EXC 096

000348

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**(PROPOSED) ORDER GRANTING
DEFENDANT VOTE YES FOR ALASKA'S FAIR SHARE'S MOTION TO DISMISS**

THE COURT, having considered Defendant Vote Yes for Alaska's Fair Share's ("Fair Share") Motion to Dismiss along with any opposition and replies, and being fully advised,

HEREBY ORDERS that Defendant Fair Share's Motion to Dismiss is GRANTED. The clerk shall accept for filing the Defendant Fair Share's Motion to Dismiss and the documents supporting the motion.

DATED this _____ day of _____, 2020.

The Honorable Thomas Matthews
Judge of the Superior Court

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ORDER GRANTING FAIR SHARE'S MOTION TO DISMISS
RDC v. Meyer, No. 3AN-20-05901 CI

Page 2 of 3

EXC 097

000349

Certificate of Service

I hereby certify that a true and correct copy of the foregoing document was served by e-mail upon the following this 18th day of May 2020.

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ORDER GRANTING FAIR SHARE'S MOTION TO DISMISS
RDC v. Meyer, No. 3AN-20-05901 CI

Page 3 of 3

EXC 098

000350

In the Matter Of:
SENATE JUDICIARY COMMITTEE

SENATE JUDICIARY COMMITTEE MEETING
March 18, 1998

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**CERTIFIED
TRANSCRIPT**

SENATE JUDICIARY COMMITTEE

MARCH 18, 1998

1:35 P.M.

PACIFIC RIM REPORTING
907-272-4383

SENATE JUDICIARY COMMITTEE
SENATE JUDICIARY COMMITTEE MEETING on 03/18/1998

Page 18

1 properly, to tender the defense of his -- of the claim that's
2 been filed against him over to, say, the City of Anchorage,
3 and say, here, I did what I was supposed to do, I followed
4 your rules, everything was okay, I'm now personally being
5 sued, defend me, and, by the way, pay the judgment and so my
6 family will not suffer because I did what you have asked or
7 told me to do.
8 I think what we're really talking about is, how does
9 that flow through. And who bears ultimate responsibility for
10 the act, of course, is the actor. But is there in fact a
11 chain that can be moved up to get to the deeper pocket than
12 what maybe just the police officer himself or the FBI agent
13 may have.
14 SENATOR WARD: Maybe, Mr. Chairman, if I can, the
15 officers that approached me to introduce this -- and, you
16 know, they're part of that CERT team that approached me to do
17 this, they're under the impression that the last phase of
18 liability still absolutely remains to them, and really it
19 wasn't so much the shooting the bean bags. They also are
20 called upon to kill people. And they know full well that
21 that's their decision and they're held responsible for it,
22 regardless of the orders that are coming down.
23 But that's why not everybody can just go into this
24 field. They have ongoing psychological tests as well as
25 reoccurring certification. It's -- not that many people

Page 19

1 would want to do it, you know, let alone do it. But
2 they're under the impression that they still have the
3 absolute final decision whether or not to shoot, and so
4 regardless of -- and it's a situation and then they have to
5 defend that situation, which they do. They spend a fair
6 amount of time in courts too. That's just a part of what
7 goes on.
8 CHAIRMAN TAYLOR: Yes, Senator Parnell.
9 SENATOR PARNELL: Is there any more public testimony
10 on the bill?
11 CHAIRMAN TAYLOR: I don't know. Is anyone here in
12 the room wishing to testify? (Indiscernible) anyone
13 (indiscernible).
14 SENATOR PARNELL: Thank you, Mr. Chairman.
15 CHAIRMAN TAYLOR: We do not -- we do not have
16 teleconference set up, I don't believe, on this one.
17 SENATOR WARD: We had just the city police and state
18 affairs --
19 CHAIRMAN TAYLOR: This is the only --
20 SENATOR WARD: They were the only ones that --
21 CHAIRMAN TAYLOR: Okay.
22 SENATOR PARNELL: Want me to move that?
23 UNIDENTIFIED SPEAKER: Yes. Sure.
24 SENATOR PARNELL: Mr. Chairman, I would move SB 309
25 from committee with individual recommendations.

Page 20

1 CHAIRMAN TAYLOR: Is there any objections? There
2 being no objection, moves from committee with individual
3 recommendations.
4 Thank you very much, Senator Ward.
5 CHAIRMAN TAYLOR: Senator Sharp. I love your tie.
6 SENATOR SHARP: Got it from my youngest conservative
7 son. Annual gift.
8 CHAIRMAN TAYLOR: Do you have any sons who aren't
9 conservative?
10 SENATOR SHARP: Good afternoon, Mr. Chairman. I
11 appreciate the opportunity to address this legislation.
12 Primarily SB 313 addresses the initiative process and some
13 areas that -- at least one area that the State of Alaska
14 hadn't -- has no rules against, and all other states do, and
15 I'll point that out.
16 It's often assumed that persons obtaining signatures
17 on a ballot initiative are volunteers who believe strongly in
18 a cause, and in many cases that is true. But unfortunately,
19 what is more often not the case. Instead, it is more likely
20 that the solicitors are signators -- signature bounty hunters
21 who are paid by the sponsor of the initiative.
22 In an effort to bring an issue process back to a
23 more grassroots effort, SB 313 requires visual identification
24 of name and voter registration identification number of the
25 petition circulators wearing it on their person at the time

Page 21

1 they're soliciting, whether they're in a mall or whether
2 knocking on doors.
3 And it also prohibits payment per signature by the
4 sponsor. Payment would still be allowed by the hour or any
5 other method. And the reason for that, Mr. Chairman, is that
6 Leg Legal has said that, in the Lower 48 where they
7 prohibited payments of any kind for obtaining signatures on
8 an initiative, it was declared unconstitutional restraint of
9 the process. But they do believe other states have at least
10 prohibited payments by the signature, and that has stood up
11 in court so far. So this proposed legislation would do that.
12 And also, the bill prohibits paying a person to sign
13 a petition, which we do not currently prohibit. We can go
14 out and buy signatures for whatever the market will bear, if
15 you've got enough money to buy them.
16 In addition, existing law grants a 30-day extension
17 to a sponsor if they are unsuccessful in obtaining the
18 required number of verified signatures within the allowed
19 time frame. So SB 313 will eliminate this 30-day extension
20 after verification if more signatures are -- if they fall
21 short of the signatures. This way, if the required number of
22 signatures are not successfully obtained, the initiative
23 simply does not appear on the ballot.
24 Simply put, Mr. Chairman, you either got them or you
25 don't. And it doesn't open the door for the period of time

In the Matter Of:
HOUSE FINANCE COMMITTEE

HOUSE FINANCE COMMITTEE MEETING

March 08, 1998

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**CERTIFIED
TRANSCRIPT**

8

HOUSE FINANCE COMMITTEE

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MARCH 8, 1998

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7:30 P.M.

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PACIFIC RIM REPORTING
907-272-4383

HOUSE FINANCE COMMITTEE
HOUSE FINANCE COMMITTEE MEETING on 03/08/1998

Page 74

1 0-LS0151/D, which, of course, is House committee substitute
2 for CS -- for Senate Bill Number 11, Finance, for the
3 accompanying fiscal notes and with individual
4 recommendations.
5 CHAIRMAN THERRIAULT: Is there objection to the
6 motion? Seeing none, the bill will be moved from
7 committee.
8 We will hold that until we get the fiscal note from
9 the department so that moves along with it.
10 Next I would like to take up Senate Bill 313. That
11 will be the only other bill that we take up this evening.
12 REPRESENTATIVE MARTIN: Mr. Chairman, how about
13 House Bill 367 (indiscernible).
14 CHAIRMAN THERRIAULT: No. We don't have that one on
15 the list.
16 REPRESENTATIVE MARTIN: We don't have that?
17 CHAIRMAN THERRIAULT: We actually -- maybe we will
18 get to that one and maybe a little bit of discussion on
19 Senate Bill 297 if there's anybody in the building yet to
20 speak on that one.
21 Marilyn, just give me a minute here.
22 UNIDENTIFIED SPEAKER: Mr. Chairman, what is the
23 bill number?
24 CHAIRMAN THERRIAULT: 313. Senate Bill 313.
25 REPRESENTATIVE MARTIN: Initiative processes.

Page 75

1 CHAIRMAN THERRIAULT: Procedures for initiatives.
2 And I believe when we left off there was a number of
3 questions regarding court cases. There is a memo from Rick
4 Glover in your file, plus, in addition, I spoke to AG today,
5 attorney with the Department of Law. There are two Meyer
6 (ph) cases. One of them has been to the Supreme Court which
7 clearly stated that you cannot prohibit the payment for the
8 gathering of signatures. It didn't specify whether you could
9 limit the amount that you get paid for gathering signatures.
10 So if we adopt language doing so, we're in a bit of a gray
11 area.
12 Also, there's a current court case dealing with the
13 person having to wear the ID badge that -- that was found to
14 be unconstitutional by the Tenth Circuit Court of Appeals.
15 It has been appealed to the Supreme Court and they have
16 decided to take that up. The State of Alaska has signed on
17 to an amicus brief to the Supreme Court in support of the
18 constitutionality of those provisions. So if we were to put
19 that language into our statutes, it would not be
20 contradictory to the position that the state has currently
21 taken before the U.S. Supreme Court.
22 I think where we left off, Representative Mulder had
23 offered his amendment -- it was Amendment Number 1 -- which
24 dealt with putting language into the bill that would allow
25 you to pay per signature up to \$1 per signature, but it would

Page 76

1 cap it at that amount. So I wanted to make it clear to
2 individuals that that cap on the payment has not been found
3 to be unconstitutional. An outright ban of any payment has
4 been found to be unconstitutional.
5 So with that, Representative Mulder, I believe you
6 had moved your amendment.
7 REPRESENTATIVE MULDER: I believe I had,
8 Mr. Chairman. Just -- but just to make certain, I'll once
9 again move Amendment Number 1.
10 CHAIRMAN THERRIAULT: Is there objection to
11 Amendment Number 1?
12 UNIDENTIFIED SPEAKER: Yes. I object.
13 CHAIRMAN THERRIAULT: There is objection.
14 Representative Davies.
15 REPRESENTATIVE DAVIES: Mr. Chair, following the
16 discussion that we had the last time we looked at this bill,
17 one of the considerations was that -- one of the concerns, I
18 think, that gives rise to this bill was the fact of people
19 carrying this petitions being aggressive and kind of in your
20 face and overly aggressive.
21 And Mr. Chair, I believe that the existing language
22 in here that's proposed in the bill that would limit the
23 payment to an hourly rate or a salary or a flat fee or
24 something like that, a daily fee or some approach, anything
25 other than a per-signature approach, would move in the

Page 77

1 direction of a person being less aggressive, less in your
2 face. In other words, if they're trying to get -- they're
3 going to get paid by the piece and by each signature, they're
4 going to be much more aggressive about going after every
5 individual person out there than otherwise.
6 So actually, while I appreciate the kind of
7 direction that the amendment is going, I -- in retrospect, I
8 think that the existing language in the bill is preferable.
9 CHAIRMAN THERRIAULT: Representative Grussendorf.
10 REPRESENTATIVE GRUSSENDORF: Yeah. Thank you,
11 Mr. Chairman. We have a suggestion as to the hourly rate,
12 but I am concerned if you pay an hourly rate, then the person
13 who is sponsoring or bankrolling a payroll as such
14 (indiscernible) reductions and everything (indiscernible)
15 workman's comp to other problems that come in there, or maybe
16 even a (indiscernible) system that within an hour we expect
17 you have X amount of petitions -- or signatures. I don't
18 know if we can get by -- you know, around that that way.
19 CHAIRMAN THERRIAULT: Representative Mulder.
20 REPRESENTATIVE MULDER: Thank you, Mr. Chairman.
21 I -- you're exactly right, Representative Grussendorf. If
22 you do a whole -- putting out the whole new realm of
23 requirements in terms of being a (indiscernible) -- or being
24 an employer. I guess I've never really experienced a problem
25 that much of having very aggressive signatory collectors. I

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 To: ANC_civil@akcourts.us
 Cc: margaret.paton-walsh@alaska.gov, ginger.bozeman@alaska.gov, matt.singer@hklaw.com,
 Subject: Case No. 3AN-20-05901CI - State's Reply in Support of Cross-Motion to Dismiss & COS attached for
 Date: 5/19/2020 4:49:01 PM

anc.law.ecf@alaska.gov

**IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
 THIRD JUDICIAL DISTRICT AT ANCHORAGE**

RESOURCE DEVELOPMENT)
 COUNCIL FOR ALASKA, INC.;)
 ALASKA TRUCKING ASSOCIATION,)
 INC.; ALASKA MINERS)
 ASSOCIATION, INC.; ASSOCIATED)
 GENERAL CONTRACTORS OF)
 ALASKA; ALASKA CHAMBER;)
 ALASKA SUPPORT INDUSTRY)
 ALLIANCE,)

Plaintiffs,)

v.)

KEVIN MEYER, in his official capacity)
 as Lt. Governor of the State of Alaska;)
 GAIL FENUMIAI, in her capacity as)
 Director of the Alaska Division of)
 Elections; the STATE OF ALASKA,)
 DIVISION OF ELECTIONS; and VOTE)
 YES FOR ALASKA'S FAIR SHARE,)

Defendants.)

**FILED in the TRIAL COURTS
 STATE OF ALASKA, THIRD DISTRICT**

MAY 19 2020

Clerk of the Trial Courts

By _____ Deputy

Case No. 3AN-20-05901 CI

3 STATE'S REPLY IN SUPPORT OF CROSS-MOTION TO DISMISS

This case requires the court to determine what remedy is available when signature gatherers in an initiative campaign are paid more than the statutory maximum.¹ A group of non-profit industry groups (RDC) filed a complaint asking the court to declare that petition signatures gathered by circulators paid in excess of a dollar

¹ The State takes no position regarding the underlying factual allegations of the complaint because it lacks sufficient evidence to show how much or on what basis signature gatherers for 19OGTX were paid.

per signature in violation of AS 15.45.110(c) are invalid and should not be counted and enjoining the lieutenant governor from counting those signatures. The State moved to dismiss on the ground that the appropriate remedy for such a violation should not be the wholesale invalidation of otherwise valid signatures.

In opposition, RDC argues that its request for declaratory relief precludes a motion to dismiss, even if the State is correct about the remedy; that the statutory language demonstrates that invalidation of signatures is an appropriate remedy; that other state courts have imposed this remedy; and that Alaska cases do not suggest a different result here. Because these arguments lack merit, the States asks the court to grant its motion to dismiss.

ARGUMENT

I. If the remedy RDC seeks is not legally available, dismissal of the complaint against the State pursuant to Alaska Civil Rule 12(b)(6) is appropriate.

RDC suggests that the State's motion to dismiss is improper under Alaska Civil Rule 12(b)(6) because even if invalidation of signatures is not an available remedy, RDC has "sought declaratory relief in addition to injunctive relief," and thus has "set forth allegations of fact consistent with and appropriate to *some enforceable cause of action*." [Opp. at 4, emphasis in original] But the declarations RDC seeks either assert its entitlement to the remedy of invalidating the signatures² or do not

² See Complaint at page 8, ¶1 ("Alaska law requires the invalidation of all signatures..."; ¶2 ("...the Lieutenant Governor ... may not count signatures..."); and ¶3 ("...the Lieutenant Governor may not count signatures...").

implicate the State.³ Therefore, if this Court finds that the appropriate remedy for the conduct alleged here—signing petition booklet certifications that falsely state the circulators were not paid in excess of \$1 per signature—is *not* to invalidate the voter signatures gathered by those particular circulators, then RDC is not entitled to either the injunctive *or* the declaratory relief against the State. This Court should therefore dismiss the complaint against the State pursuant to Civil Rule 12(b)(6) .

II. *North West Cruiseship Association of Alaska, Inc. v. State* does not support wholesale invalidation of the signatures in this case.

RDC extensively discusses *North West Cruiseships Association of Alaska v. State*, [Opp. at 21-25] but fails to recognize that rather than supporting its position, this case undermines it in two important ways. First, the case demonstrates that the Alaska Supreme Court's commitment to protecting Alaskans' right to propose and enact laws by liberally construing initiative statutes extends to signature-gathering challenges. The Court has not distinguished between petition-signing and casting a ballot at an election in the manner that RDC suggests. [Opp. at 27-30] On the contrary, the Court itself analogized invalidation of signatures to voter disenfranchisement when it upheld the Division's decision to count signatures as "in line with our directive in *Fischer v. Stout* to seek 'a construction ... which avoids the wholesale dis[en]franchisement of qualified electors.'"⁴

³ See Complaint at page 8-9, ¶4 (seeking "a declaration that Vote Yes For Alaska's Fair Share violated AS 15.45.110(c)...").

⁴ *North West Cruiseship Ass'n of Alaska, Inc. v. State*, 145 P.3d 573, 578 (Alaska 2006) (quoting *Fischer v. Stout*, 741 P.2d 217, 255 (Alaska 1987)).

Second, in *North West Cruiseships* the Alaska Supreme Court approved counting signatures even though the booklets did not comply with the governing statute or regulation, thereby promoting—rather than diluting—voter enfranchisement. The statutes at the time required that the name of the person or organization that had agreed to pay the circulator be included on *each page* of a petition booklet.⁵ And the Division’s implementing regulations instructed that signatures would “not be counted if the ‘circulator did not complete the information on *each* signature page as required by AS 15.45.130(8).”⁶ In effect, “the Division’s own regulations bar[red] it from counting any of the signatures in an entire petition booklet that failed to provide the ‘paid by’ information on each and every page.”⁷ Despite this unambiguous statutory and regulatory directive, the Division disqualified only the signatures on the specific pages that lacked the required information.⁸

The Alaska Supreme Court upheld the Division’s more tailored approach, concluding that “counting signatures from the pages containing the proper ‘paid by’ information reflects the balance sought by the legislature between the people’s right to legislate by initiative and the goal of ensuring that petition subscribers are well-informed upon signing.”⁹ In other words, when the legal transgression did not affect the

⁵ *Id.* at 578.

⁶ *Id.*

⁷ *Id.* at 578.

⁸ *Id.* at 578.

⁹ *Id.* at 578.

signer's knowledge or understanding of the matter at hand—i.e. the integrity of the signature as a sign of the voter's genuine, informed support for the initiative—wholesale invalidation of all of the signatures was an improper remedy. The Court recognized that the balance between the right to legislate by initiative and the goal of ensuring that subscribers were not fundamentally misled tipped clearly in favor of counting the signatures.

The same is true here. Even assuming that the petition circulators in this case were paid, *and knew they were paid*,¹⁰ in violation of AS 15.45.110(c), that is no reason to invalidate each and every signature of every Alaskan voter who sought to support 19OGTX's path to the ballot. There is no allegation that voters were denied critical outcome-determinative information that necessarily influenced their decision to sign, that any of the qualified voters who signed the petition booklets do not actually support putting 19OGTX on the ballot, or that the amount of pay a circulator believed they would receive was pertinent to any voter's decision whether to sign. The complaint also lacks any allegation that any of the signatures is fraudulent. Thus, contrary to RDC's

¹⁰ Because RDC's justification for discounting or invalidating every signature collected by any circulator who signed a fraudulent affidavit relies on the premise that the circulators are inherently untrustworthy, RDC would also need to establish that the circulators actually signed their affidavits knowing they were false. This means in order to prevail, RDC must show not only that circulators were paid more than a \$1 but also that circulators knew this payment violated AS 15.45.110(c), thereby knowingly falsifying the affidavit. Fair Share's contrary interpretation of the statute suggests circulators could have been paid consistent with the recruitment notice but nevertheless believed they had not violated the statute and signed the affidavit in good faith.

view, *North West Cruiseships* supports counting valid signatures so long as a statutory violation did not compromise the integrity of the gathered signatures.

Similarly, RDC's attempts to distinguish the other Alaska election cases cited by the State miss the mark. [Opp. at 27-30] Certainly, these cases addressed different fact patterns than this case does—the parties agree that this is a case of first impression in Alaska—but the earlier cases remain persuasive authority for the proposition that Alaska courts should not lightly disqualify the initiative petition signatures of qualified Alaskan voters. The Alaska Supreme Court has consistently applied a liberal construction of election statutes both to count valid votes and petition signatures and to preserve initiative measures so that Alaskans can express their views at the ballot box. [See State's Mot. at 9, 12] This Court should adhere to that same framework and decline RDC's expansive and unprecedented effort to nullify the intent of thousands of Alaskan voters.

III. The initiative statutes do not contemplate more than a facial review of circulator certifications by the Lieutenant Governor.

RDC and the State agree that under AS 15.45.130, "the lieutenant governor may not count subscriptions on petitions not properly certified at the time of filing or corrected before the subscriptions are counted." But the parties disagree on the statute's interpretation. RDC's interpretation ignores the statute's failure to grant authority for the Lieutenant Governor to investigate the veracity of circulator affidavits and should therefore be rejected.

In RDC's view, the directive that the lieutenant governor may not count subscriptions on petitions "not properly certified" contemplates that the lieutenant governor can "investigate and invalidate petition booklets and all subscriptions contained therein if they are supported by a false circulator affidavit." [Opp. at 10] RDC further asserts that "[u]ntruthful statements in a circulator affidavit do not 'properly certify' the accompanying petition booklet." [Opp. at 10] And finally RDC mischaracterizes the State's argument about the lieutenant governor's authority, claiming that the "argument that the lieutenant governor lacks the authority to invalidate petitions supported by false circulator affidavits is not supported by a single citation to relevant Alaska caselaw or persuasive Outside authority." [Opp. at 11]

Contrary to RDC's claim, the statute does not contemplate that the lieutenant governor has the ability to investigate circulator affidavits. Rather, AS 15.45.130 can be read just as reasonably to require the lieutenant governor to conduct only a facial review of the circulator certifications to ensure that they contain the declarations mandated by AS 15.45.130(1)-(8). Indeed, the language "properly certified *at the time of filing or corrected before the subscriptions are counted*" suggests an administrative process rather than an investigative one, particularly because it permits correction of errors if done timely. Moreover, AS 15.45.150 gives the lieutenant governor "not more than 60 days" to complete the necessary review of the petition, which is not much time to

conduct the kind of searching investigation into the truth of circulator affidavits.¹¹ And the parallel recall statutes, which impose the same payment limitation and circulator certification requirements, allow only 30 days for the lieutenant governor's review.¹²

Moreover, the State has not argued that the lieutenant governor "lacks the authority to invalidate petitions supported by false circulator affidavits," but rather that the statutes do not give the lieutenant governor any *means* to investigate and determine whether circulator affidavits are true or not. The current statutory framework does not delineate or identify any process for investigation or give the lieutenant governor any power to compel circulators or sponsors to provide evidence, much less the time to do so. Thus, as written, Title 15 does not contemplate a robust elections investigation into the purported truthfulness of circulator affidavits, and hence supports the State's interpretation of AS 15.45.130. The statute as written requires a facial review of the sufficiency of those affidavits and directs the lieutenant governor to disregard only those petitions that fail to pass facial review.¹³ In essence, even if AS 15.45.130 could be read

¹¹ AS 15.45.150 provides in full: "Within not more than 60 days of the date the petition was filed, the lieutenant governor shall notify the committee whether the petition was properly or improperly filed, and at which election the proposition shall be placed on the ballot."

¹² See AS 15.45.580(b) (governing payment of circulators); AS 15.45.600 (requiring petitions be certified with affidavit from circulator); and AS 15.45.620 (setting 30 day deadline for review of petition).

¹³ See *Bradshaw v. Ashcroft*, 559 S.W.3d 79, 88 (Mo. Ct. App. 2018) ("However, neither section, nor any other provision in Chapter 116, authorizes the secretary of state to look behind a circulator's notarized affidavit to determine its veracity or proper execution.").

as “contemplat[ing]” that the lieutenant governor can investigate whether circulator affidavits are false, the reality is that he lacks the necessary powers to do so.

Thus, looking at the statutory scheme as a whole, and recognizing that the lieutenant governor has no investigatory authority with respect to the truthfulness of circulator affidavits, the most reasonable interpretation of AS 15.45.130 is that it instructs the lieutenant governor to review circulator affidavits to ensure that they contain the required information and not to count booklets that are not supported by complete affidavits.

IV. Although many other state courts have invalidated signatures supported by falsified affidavits, those cases are not controlling here and do not defeat the clear import of relevant Alaska cases.

RDC argues that the “weight of American authority supports” their position, but the proper interpretation of Alaskan law does not depend on an arithmetical survey of how many states have adopted the rule they advocate. Instead, this Court should look to related Alaska cases that signal the principles that should be applied here. The Alaska Supreme Court has consistently held that the statutes governing the initiative process “should be liberally construed” so as to “preserve [initiatives] whenever possible”¹⁴ and ““avoid[] the wholesale dis[en]franchisement of qualified electors.””¹⁵

¹⁴ *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173, 1181 (Alaska 1985) (quoting *Boucher v. Engstrom*, 528 P.2d 456, 462 (Alaska 1974)).

¹⁵ *Nw. Cruiseship Ass’n*, 145 P.3d at 578 (quoting *Fischer v. Stout*, 741 P.2d 217, 225 (Alaska 1987)).

Applying these general principles to the situation at hand, and considering the closest precedent—*North West Cruiseship Association*—compels the conclusion that the remedy RDC seeks is not available. In *North West Cruiseship Association*, the Alaska Supreme Court threw out only the signatures of voters who had not seen the required “paid by” disclosure and who might have decided not to sign if they had. All other signatures were counted, despite the statute and regulation to the contrary, and despite the fact that the circulators of those petition booklets had violated the statutory affidavit requirement.¹⁶ As the Court noted, “[p]ursuant to the form of AS 15.45.130(8) in effect at that time, the circulator must attest that he or she placed [the paid by] information in bold capital letters in the space provided before the circulation of the booklet.”¹⁷ The circulators had not done this, and thus had sworn false affidavits, but only the signatures directly affected were held to be invalid.

The State acknowledges that some other state courts have taken a hard line with respect to petition signatures that are supported by fraudulent circulator affidavits.¹⁸ But as it pointed out in its opening motion, many of these cases involve other indicia of fraud affecting the genuineness of the signatures themselves. [State’s Mot. to Dismiss at 2, and cases in n. 1] And some of the cases discussed by RDC do not turn on affidavit

¹⁶ *Id.* at 578.

¹⁷ *Id.*

¹⁸ See e.g., *Maine Taxpayers Action Network v. Sec. of State*, 795 A.2d 75 (Me. 2002) (invalidating all signatures collected by individual posing as James Powell, because there was no evidence of who he really was).

fraud at all. For example, although RDC cites *State ex rel. Schmelzer v. Board of Elections of Cuyahoga County*, that case is not about the impact of a false affidavit. In *Schmelzer*, the Ohio Supreme Court invalidated the signatures gathered by a specific circulator because she was not eligible to gather signatures under Ohio law and, unlike Alaska, the court noted, “[i]t is well settled in this state ‘that election statutes are mandatory and must be strictly complied with.’”¹⁹ Although the signature gatherer had signed an affidavit swearing that she was a qualified elector of the state of Ohio when she was not, the court’s analysis turns on the fact that she was ineligible to gather signatures as required by law, not on the fact that her affidavit was false.

RDC also overstates the holding of *In re Initiative Petition No. 379, State Question No. 726*.²⁰ Although the Oklahoma Supreme Court noted the criminal penalties for falsely swearing that one was a qualified elector, it explained that its holding was based on a broader spectrum of factors: “[t]he involvement of out-of-state circulators in the signature gathering process establishes a pervasive pattern of wrongdoing and fraud which, combined with the resistance to discovery and continued secrecy surrounding the operation, require[d the initiative petition] to be stricken in its entirety.”²¹ Thus, the Court’s decision rested on more than false circulator affidavits.

¹⁹ *State ex rel. Schmelzer v. Board of Elections of Cuyahoga County*, 440 N.E.2d 801, 803, 2 Ohio St.3d 1, 4 (Ohio, 1982) (quoting *State, ex re. Senn v. Bd. of Elections*, 367 N.E.2d 879 (Ohio 1977)).

²⁰ 155 P.3d 32 (Okla. 2006).

²¹ *Id.* at 36; see also, *id.* at 34.

Similarly, in *Benca v. Martin*, the 1,040 signatures that RDC discusses were not invalidated because circulators had provided false affidavits, but because the statutes required that the names of paid circulators be disclosed to the Secretary of State *before* they began to collect signatures and these signatures had been gathered by circulators whose names were disclosed later or not at all. And, significantly, the court invalidated the signatures because of a clear statutory directive that “[s]ignatures incorrectly obtained or submitted under this section [requiring disclosure of circulators] shall not be counted by the Secretary of State.”²² This case is much more akin to the State’s interpretation of the statute at issue in this case. In Alaska, a petition turned in without a circulator affidavit would not be counted because it was not properly certified. On the other hand, the Alaska statute specifically prohibiting payment of more than a dollar per signature does not direct that the lieutenant governor shall not count signatures gathered in violation of that rule.²³ Instead, it simply imposes criminal penalties for any violations.²⁴

But far more important than the many factual distinctions of the out-of-state cases is the weight of Alaska cases addressing voters’ right to place initiative measures on the ballot and protecting Alaskans’ right to vote in general. Because RDC has not alleged that any of the qualified voters who signed were affected in any way that would

²² *Benca v. Martin*, 500 S.W.3d 742, 749 (Ark. 2016).

²³ *See* AS 15.45.110.

²⁴ AS 15.45.110(e).


compromise the integrity of their signatures, the Alaska cases protecting access to the ballot for initiatives suggests that the “wholesale” invalidation of signatures here would be inappropriate.

CONCLUSION

Because Alaska courts liberally construe initiative statutes in favor of giving voters an opportunity to express their view of initiatives at the ballot box and the statutes at issue here are best read as requiring only a facial review of circulator affidavits and include criminal penalties to incentivize compliance with the payment limits, the State respectfully asks this Court to hold that wholesale invalidation of signatures is not an appropriate remedy for a violation of AS 15.45.110(c) and dismiss RDC’s complaint against the State.

DATED May 19, 2020.

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Subject: 3AN-20-05901CI - Opposition to Motion for Judgment on the Pleadings & Cross-Motion for Partial

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

RESOURCE DEVELOPMENT COUNCIL)
FOR ALASKA, INC.; ALASKA TRUCKING)
ASSOCIATION, INC.; ALASKA MINERS)
ASSOCIATION, INC.; ASSOCIATED)
GENERAL CONTRACTORS OF ALASKA;)
ALASKA CHAMBER; and ALASKA)
SUPPORT INDUSTRY ALLIANCE,)

Plaintiffs,)

v.)

KEVIN MEYER, in his official capacity,)
as Lt. Governor of the State of Alaska;)
GAIL FENUMIAI, in her capacity as Director)
of the Alaska Division of Elections; the)
STATE OF ALASKA, DIVISION OF)
ELECTIONS; and VOTE YES FOR)
ALASKA'S FAIR SHARE,)

Defendants.)

FILED In the TRIAL COURTS
STATE OF ALASKA, THIRD DISTRICT

JUN 02 2020

Clerk of the Trial Courts

By _____ Deputy

Case No. 3AN-20-05901CI

**PLAINTIFFS' OPPOSITION TO DEFENDANT VOTE YES FOR
ALASKA'S FAIR SHARE'S MOTION FOR JUDGMENT ON THE
PLEADINGS AND CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT**

I. INTRODUCTION

Defendant Vote Yes For Alaska's Fair Share's ("Defendant Vote Yes") motion for judgment on the pleadings throws every argument possible at defeating this lawsuit before discovery is completed, but none of its arguments are persuasive. This Court should not dismiss this lawsuit when Defendant Vote Yes cannot cite a single case that controls

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EXC 118

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disposition of this lawsuit: if Defendant Vote Yes violated AS 15.45.110(c)'s restriction on circulator payment and the circulators falsely certified their payment as confirming with that restriction, should the signatures supported by that circulator's false affidavit be invalidated. Plaintiffs assert that they should, while Defendants assert they should not. There is no controlling Alaska Supreme Court precedent on point, but the majority of the persuasive authority from other jurisdictions supports Plaintiffs' position. As such, it would be reversible error for this Court to dismiss this lawsuit at this premature juncture.

Defendant Vote Yes's arguments have no basis in fact and law. *First*, Defendant Vote Yes confuses this motion practice by arguing that its non-resident circulators were permitted to gather subscriptions.¹ This is a strawman argument. Residency is not an issue in this lawsuit. Plaintiffs' claims have only to do with circulator payment and the circulator certification about that payment, not the residency of the circulator. Defendant Vote Yes's repeated reference to Alaska's residency requirement for circulators at AS 15.45.105(3) is a distraction from its unlawful payments to signature gatherers.

Second, Defendant Vote Yes erroneously asserts that *Meyer v. Grant*, 486 U.S. 414 (1988), defeats Plaintiffs' "novel theory" that false statements in circulator certifications could invalidate those subscriptions supported by the false certification.² Not true. *Meyer v. Grant* struck down a Colorado statute that made it a felony offense to compensate

¹ Defendant Vote Yes For Alaska's Fair Share's Motion to Dismiss, at 4-5 (May 18, 2020) ("Defendant Vote Yes's Motion").

² Defendant Vote Yes's Motion, at 5.

signature gatherers in any manner. The U.S. Supreme Court ruled that Colorado could not completely prohibit the payment of circulators, but did not rule, as Defendant Vote Yes implies, that circulators must be able to be paid hourly or by salary compensation with no limit. Moreover, *Meyer* does not involve the appropriate remedy if a circular falsely certifies compliance with state law that provides that “the lieutenant governor may not count subscriptions on petitions not properly certified at the time of filing or corrected before the subscriptions are counted.”³ *Meyer* certainly does not equate the upholding of state statutes that require truthful circulator affidavits to the “disenfranchisement” of voters.

Third, Defendant Vote Yes misleadingly cherry picks a single statement from a legislator during a single legislative hearing as alleged proof that AS 15.45.110(c) permits salary or hourly payment in excess of \$1 per signature for all the signatures the circulator has gathered. But the full legislative history tells a different story. The Alaska Legislature explicitly considered a provision permitting the hourly or salary payment of circulators in excess of \$1 per signature, and rejected that proposal. Alaska law restricts the payment of circulators to \$1 per signature or less to ensure that initiatives are fostered and reach the general ballot only if there truly is an Alaskan grassroots movement. AS 15.45.110(c) restricts circulator payment to \$1 or less per signature collected to prevent the initiative

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³ AS 15.45.130.

OPPOSITION TO DEFENDANT VOTE YES FOR ALASKA'S FAIR SHARE'S MOTION TO DISMISS
AND CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT
DEVELOPMENT COUNCIL, INC. ET AL. V. FENUMIAI AND DIVISION OF ELECTIONS
CASE NO. 3AN-20-05901 CI

PAGE 3 OF 34

EXC 120

000222

process from being advanced by Outside interests with deep pockets but little Alaskan support.

Fourth and finally, Defendant Vote Yes repeats its oft-repeated trope that invalidating subscriptions supported by false circulator affidavits amounts to “disenfranchising” all Alaskans who signed in support of the 19OGTX initiative. As Plaintiffs pointed out in previous briefing, other state supreme courts have rejected the rhetoric that enforcing state statutes governing the initiative process is disenfranchising voters. No votes have taken place. The enforcement of Alaska's statute prohibiting the lieutenant governor from counting subscriptions not properly certified because they are certified by a false affidavit⁴ upholds the integrity of the initiative process. No voters will be disenfranchised if this Court enforces AS 15.45.130 and invalidates subscriptions supported by false circulator certifications. Defendant Vote Yes always has the option of regrouping, complying with Alaska law, and gathering enough subscriptions to get the issue placed on the next general election ballot.

Plaintiffs cross move for partial summary judgment. Given the plain language in AS 15.45.130, the State's prior invalidation of subscriptions that were tainted by circulator misconduct, and the weight of persuasive authority, Plaintiffs move this Court to rule that AS 15.45.130 prohibits the lieutenant governor from counting subscriptions supported by circulator affidavits that contain a false statement about compliance with AS 15.45.110(c).

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⁴ AS 15.45.130.

AS 15.45.130 provides that "the lieutenant governor may not count subscriptions on petitions not properly certified at the time of filing or corrected before the subscriptions are counted." To certify a petition, the circulator must swear under oath that they complied with Alaska law in gathering the signatures.⁵ Plaintiffs ask this Court to rule that a petition is not "properly certified" under AS 15.45.130 if the affidavit supporting it contains false statements. This is consistent with the Alaska Supreme Court's approval of the State's disqualification of otherwise valid subscriptions in *North West Cruiseship Association v. State* because the circulators failed to list on every page of the petition who was paying them to circulate the petition.⁶ The *North West Cruiseship Association* Court approved of these disqualifications, and did not equate the disqualification to disenfranchising voters. The remedy of invalidating otherwise valid subscriptions because they are supported by a circulator affidavit with a material false statement has been approved by the majority of state supreme courts that have tackled the issue.⁷ The Court should therefore grant Plaintiffs' cross-motion for summary judgment that AS 15.45.130 prohibits the state from

⁵ AS 15.45.130.

⁶ *North West Cruiseship Ass'n of Alaska, Inc. v. State*, 145 P.3d 573, 578 (Alaska 2006) (Alaska Supreme Court approving of the Division's disqualification of otherwise valid subscriptions contained on pages of the petition that did not include the required disclosure of who was paying the circulator).

⁷ See e.g. *Maine Taxpayers Action Network v. Secretary of State*, 795 A.2d 75, 80 (Me. 2002); *Montanans for Justice v. State ex rel. McGrath*, 146 P.3d 759, 778 (Mont. 2006); *Brousseau v. Fitzgerald*, 675 P.2d 713, 715 (Ariz. 1984); *Benca v. Martin*, 500 S.W.3d 742, 745-49 (Ark. 2016).

counting subscriptions that falsely claim the circulator has complied with applicable statutory requirements.

In sum, this Court should deny Defendant Vote Yes's Motion because it has not shown that Plaintiffs have failed to state a claim upon which relief may be granted. To the contrary, AS 15.45.130 unambiguously prohibits the State from counting subscriptions that are not properly certified by a truthful circulator affidavit. Plaintiffs move this Court to rule that the proper remedy under AS 15.45.130 is that the State must invalidate subscriptions submitted with a false circulator certification.

II. FACTUAL AND PROCEDURAL BACKGROUND

In late 2019, Defendant Vote Yes, the official ballot group for a state-wide initiative entitled "An Act changing the oil and gas production tax for certain fields, units, and nonunitized reservoirs on the North Slope" (hereinafter "19OGTX"), hired an out-of-state professional signature-gathering company named Advanced Micro Targeting, Inc. ("Advanced Micro Targeting") to provide circulators to gather subscriptions on petitions supporting 19OGTX's inclusion on this November's general state election ballot.⁸

On January 17, 2020, Defendant Vote Yes submitted the petitions that contained all of the subscriptions collected by unpaid and paid circulators.⁹ In total, Defendant Vote

⁸ Plaintiffs' Complaint, ¶ 14 (Apr. 10, 2020).

⁹ <http://www.elections.alaska.gov/Core/initiativepetitionlist.php#19OGTX>. "Petition Filed with Elections: January 17, 2020." *Id.*

Yes submitted 44,881 subscriptions in support of 19OGTX.¹⁰ A total of 28,501 qualified subscriptions were required for 19OGTX to reach the general election ballot.¹¹ Defendant Lieutenant Governor Kevin Meyer had 60 days to evaluate the subscriptions and determine whether 28,501 qualified subscriptions were submitted in support of 19OGTX.¹²

On March 17, 2020, Defendant Lieutenant Governor Kevin Meyer issued his determination that a sufficient number of qualified subscriptions had been submitted in support of the 19OGTX initiative, that it was properly filed, and that 19OGTX would appear on the general election ballot for the November 3, 2020 general election.¹³ Specifically, the lieutenant governor determined that 5,707 of the 44,881 total subscriptions submitted were not qualified, but that there were 39,174 qualified subscriptions remaining which met the 28,501 threshold needed for 19OGTX to reach the ballot.¹⁴ The determination advised that “under AS 15.45.240, any person aggrieved by my determination set out in this letter may bring an action in superior court to have the determination reversed within 30 days of the date on which notice of the determination

¹⁰ See Petition Summary Report for 19OGTX (available at: <http://www.elections.alaska.gov/petitions/19OGTX/19OGTX-PetSumReportFINAL.pdf>).

¹¹ *Id.*

¹² AS 15.45.130 through AS 15.45.150.

¹³ See Letter from Lt. Governor Meyer to Robin Brena (March 17, 2020) (available at: <http://www.elections.alaska.gov/petitions/19OGTX/19OGTX-LetterToSponsor.pdf>).

¹⁴ See Petition Summary Report for 19OGTX (available at: <http://www.elections.alaska.gov/petitions/19OGTX/19OGTX-PetSumReportFINAL.pdf>).

was given.”¹⁵ Plaintiffs complied with this statutory timeline and filed suit within 30 days of the lieutenant governor's determination.

On April 10, 2020, Plaintiffs filed their Complaint for Injunctive and Declaratory Relief (“Plaintiffs' Complaint”). Three days later, on April 13, 2020, Vote Yes received service of Plaintiffs' Complaint through Robin Brena,¹⁶ who serves as Vote Yes's chair¹⁷ and its legal counsel.¹⁸ On May 4, 2020, Vote Yes filed its Answer to Plaintiffs' Complaint. On May 18, 2020, Defendant Vote Yes filed its instant Motion, asking the Court to dismiss this lawsuit in its entirety.

Plaintiffs file this Opposition and Cross-Motion asking this Court to reject Defendant Vote Yes's legal positions and to rule that AS 15.45.130 prohibits the lieutenant governor from counting subscriptions not properly certified by a truthful circulator affidavit.

III. DISCUSSION

In Alaska, “[t]he motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted.”¹⁹ To survive a motion to dismiss, a complaint “need only

¹⁵ Letter from Lt. Governor Meyer to Robin Brena, at 2 (March 17, 2020).

¹⁶ See Civil Rule 4(f) Declaration, at 1-2, and 4 (April 28, 2020).

¹⁷ See Alaska Public Offices Commission Group Registration Form for Vote Yes for Alaska (May 13, 2020) (available at: <https://aws.state.ak.us/ApocReports/Common/View.aspx?ID=4878&ViewType=GR>).

¹⁸ See Entry of Appearance for Vote Yes for Alaska's Fair Share (April 27, 2020).

¹⁹ *Knight v. American Guard & Alert, Inc.*, 714 P.2d 788, 791 (Alaska 1986).

allege a set of facts consistent with and appropriate to some enforceable cause of action.”²⁰ The court must “presume all factual allegations of the complaint to be true and [make] all reasonable inferences . . . in favor of the non-moving party.”²¹ “If, within the framework of the complaint, evidence may be introduced which will sustain a grant of relief to the plaintiff, the complaint is sufficient.”²² A complaint survives a motion to dismiss even if the plaintiff has not pleaded the correct cause of action or remedy: “In determining the sufficiency of the stated claim it is enough that the complaint set forth allegations of fact consistent with and appropriate to *some enforceable cause of action*.”²³ “[T]he court is under a duty to examine the complaint to determine if the allegations provide for relief *on any possible theory*.”²⁴

Defendant Vote Yes's three contentions for dismissal of this lawsuit are without merit.

A. Defendant Vote Yes cites no legal authority for its position that prohibiting circulator compensation in excess of \$1 per signature collected is unconstitutional.

In the span of less than five pages, Defendant Vote Yes unpersuasively attempts to

²⁰ *Larson v. State, Dept. of Corrections*, 284 P.3d 1, 6 (Alaska 2012) (quoting *Guerrero v. Alaska Hous. Fin. Corp.*, 6 P.3d 250, 253-54 (Alaska 2000)); *see also Odom v. Fairbanks Memorial Hosp.*, 999 P.2d 123, 128 (Alaska 2000).

²¹ *Caudle v. Mendel*, 994 P.2d 372, 374 (Alaska 1999).

²² *Id.*

²³ *Knight*, 714 P.2d at 791 (quoting *Linck v. Barokas & Martin*, 667 P.2d 171, 173 (Alaska 1983)) (emphasis in *Knight*).

²⁴ *Id.* (quoting 5 Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 1357, at 602 (1969)) (emphasis in *Knight*).

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prove that interpreting AS 15.45.110(c) by its plain meaning would render it unconstitutional under Free Speech principles. That attempt is unavailing because the provision is clear and plain. AS 15.45.110(c) unambiguously provides: "A circulator may not receive payment or agree to receive payment that is greater than \$1 a signature, and a person or an organization may not pay or agree to pay an amount that is greater than \$1 a signature, for the collection of signatures on a petition." This provision does not say, as Defendant Vote Yes asserts, that a ballot group may pay circulators in excess of \$1 per signature they have collected so long as the payment is done on an hourly or salary basis. To the contrary, this provision prohibits any form of payment to circulators in excess of \$1 for every signature they have gathered. This provision prevents ballot groups from flooding Alaska's initiative process with professional, paid circulators that have no interest in Alaska's local laws.

The Alaska Supreme Court has repeatedly confirmed that in determining the meaning of "statutory language we begin with the plain meaning of the statutory text."²⁵ Here, AS 15.45.110(c) dictates in clear terms what, precisely, is prohibited: circulator payment that is greater than \$1 for every signature gathered. Plaintiffs' Complaint alleges a direct violation of that clear legislative limitation. Defendant Vote Yes hired circulators employed by Advanced Micro Targeting and that these professional circulators were compensated in excess of \$1 per signature:

²⁵ *Hendricks-Pearce v. State, Dept. of Corrections*, 323 P.3d 30, 35 (Alaska 2014); *Ward v. State, Dep't of Pub. Safety*, 288 P.3d 94, 98 (Alaska 2012).

Advanced Micro Targeting offered to pay an amount that is greater than \$1 per signature for the collection of signatures on a petition by advertising that it would pay signature gatherers \$3,500 - \$4,000 per month plus bonus, and that it expected 80-100 signatures per day, six days per week in return for such compensation.²⁶

This is a straightforward challenge to whether Defendant Vote Yes unlawfully induced professional circulators to gather subscriptions in Alaska by compensating them in excess of \$1 for each signature gathered in violation of AS 15.45.110(c).

The cases cited by Defendant Vote Yes do not support its argument that this plain reading of AS 15.45.110(c) is unconstitutional. In *Meyer v. Grant*, the U.S. Supreme Court struck down a Colorado statute that prohibited *any form* of payment to petition circulators.²⁷ Alaska has not banned the payment of circulators. AS 15.45.110(c) explicitly permits the compensation of signature gatherers. Defendant Vote Yes cites no case holding that Alaska's limitation on payment of circulators to \$1 per signature gathered is unconstitutional. Many states regulate the payment of circulators while not outright banning such payments. And no U.S. Supreme Court case has struck down any of these states' laws.

²⁶ Plaintiffs' Complaint, ¶ 22.

²⁷ *Meyer v. Grant*, 486 U.S. 414, 428 (1988). "The Colorado statute prohibiting the payment of petition circulators imposes a burden on political expression that the State has failed to justify." *Id.*

Indeed, several states prohibit the per-signature payment of circulators, including New York,²⁸ Montana,²⁹ Arizona,³⁰ Florida,³¹ Oregon,³² North Dakota,³³ and South Dakota.³⁴ In *Person v. New York State Board of Elections*, the Second Circuit upheld against a First Amendment challenge, New York's complete prohibition on the per-signature payment of circulators:

[Plaintiff] argues that New York's section 17-122(4) prohibition on per-signature payment of those employed to circulate election petitions does not comport with *Meyer*, which prohibited states from imposing unduly burdensome and unjustified restrictions on the payment of petition signature collectors. We join the Eighth and Ninth Circuits in holding that a state law prohibiting the payment of electoral petition signature gatherers on a per-signature basis does not per se violate the First or Fourteenth Amendments. See *Prete v. Bradbury*, 438 F.3d 949 (9th Cir. 2006); *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614 (8th Cir. 2001). Like our sister circuits, we find the record presented to us provides insufficient support for a claim that the ban on per-signature payment is akin to the complete prohibition on paying petition circulators that was deemed unconstitutional in *Meyer*, or that the alternative methods of payment it leaves available are insufficient.³⁵

The Ninth Circuit's decision in *Prete* upheld Oregon's ban on per-signature payment of circulators.³⁶ The Eighth Circuit's decision in *Jaeger* upheld North Dakota's statute that

²⁸ NY Elec L § 17-122(4).

²⁹ Montana Code Ann. § 13-27-102(2)(b).

³⁰ Arizona Revised Statutes 19-118.

³¹ Florida Statutes Title IX, Chapter 99.097 § 4.

³² Oregon Constitution Art. IV, Section 1b.

³³ N.D.C.C. 16.1, Chapter 1, Section 12(11).

³⁴ S.D.L.C. § 12-13-28.

³⁵ *Person v. New York State Bd. of Elections*, 467 F.3d 141, 143 (2d Cir. 2006).

³⁶ *Prete v. Bradbury*, 438 F.3d 949, 971 (9th Cir. 2006).

prohibited per-signature payment of circulators.³⁷ Defendant Vote Yes cites no case striking down a state statute that merely regulates compensation of circulators, as AS 15.45.110(c) does. This Court should follow these courts' reasoning that *Meyer* does not hold that a state must allow all forms of circulator payment without limit as Defendant Vote Yes implies.

Defendant Vote Yes falls far short of demonstrating that AS 15.45.110(c)'s prohibition on circulator payment in excess of \$1 for every signature the circulator gathers "is akin to the complete prohibition on paying petition circulators that was deemed unconstitutional in *Meyer*, or that the alternative methods of payment it leaves available are insufficient."³⁸

B. The proper statutory analysis of AS 15.45.110(c) confirms that Alaska prohibits all forms of circulator payment that exceed \$1 for every signature gathered by the circulator.

Defendant Vote Yes asserts that the legislative history of AS 15.45.110(c) proves that circulators may be paid in excess of \$1 for every signature they have gathered so long as it is done on an hourly or salary basis. That conclusion is not supported by the legislative history, and ignores the proper statutory analysis which begins with the meaning of the words enacted into law at AS 15.45.110(c). The proper analysis shows that AS 15.45.110(c) prohibits any form of payment to circulators that exceeds \$1 for every

³⁷ *Initiative & Referendum Institute v. Jaeger*, 241 F.3d 614, 617-18 (8th Cir. 2001).

³⁸ *Person*, 467 F.3d at 143.

signature they have gathered, and that the Legislature considered and rejected permitting hourly and salary payment of circulators in excess of this limit.

As noted above, the Alaska Supreme Court has repeatedly confirmed that in determining the meaning of “statutory language we begin with the plain meaning of the statutory text.”³⁹ The Court then turns to “the legislative history, and the purpose of the statute and adopt the rule of law that is most persuasive in light of precedent, reason and policy.”⁴⁰

Defendant Vote Yes is correct that Senator Sharp did introduce the bill that resulted in Alaska's limitation on circulator payment at AS 15.45.110(c). But, Defendant Vote Yes is incorrect that Senator Sharp intended the language that was eventually enacted at AS 15.45.110(c) to allow hourly or salary payment of circulators in excess of \$1 for every subscription gathered. Senator Sharp's bill, as originally introduced, sought to make AS 15.45.110(c) read as follows:

A sponsor⁴¹ may not receive payment or agree to receive payment, and a person or an organization may not pay or agree to pay, for the collection of signatures on a petition if any part of the payment is based on the number of signatures collected. **This subsection does not prohibit a sponsor from**

³⁹ *Hendricks-Pearce v. State, Dept. of Corrections*, 323 P.3d 30, 35 (Alaska 2014); *Ward v. State, Dep't of Pub. Safety*, 288 P.3d 94, 98 (Alaska 2012).

⁴⁰ *State, Office of Public Advocacy v. Estate of Jean R.*, 371 P.3d 614, 618 (Alaska 2016); see also *In re Protective Proceedings of Vernon H.*, 332 P.3d 565, 572 (Alaska 2014) (quoting *Enders v. Parker*, 66 P.3d 11, 13–14 (Alaska 2003)).

⁴¹ In 2000, the Alaska Legislature made non-material changes to AS 15.45.110(c) to rename the individuals collecting signatures from “sponsors” to “circulators.” See Senate CS for CS for House Bill No. 163(RLS) am S at pg. 26, available at <http://www.akleg.gov/PDF/21/Bills/HB0163F.PDF>.

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being paid an amount that is not based on the number of signatures collected.⁴²

It was during Senator Sharp's introduction of this original language in Senate Bill 313 that he made the statements quoted by Defendant Vote Yes. But that language did not survive the legislative debates and did not make the final cut.

Senate Bill 313 was passed out of the Senate unrevised, but it was substantially changed by the House. Representative Gene Therriault of Fairbanks was the Co-Chair of the House Finance Committee, and he introduced a new version of SB 313 (FIN) that proposed to have AS 15.45.110(c) read as follows:

A sponsor may not receive payment or agree to receive payment that is greater than \$1 a signature, and a person or an organization may not pay or agree to pay an amount that is greater than \$1 a signature, for the collection of signatures on a petition.⁴³

Three days later, the Senate unanimously passed SB 313 (FIN). Alaska Governor Tony Knowles signed it into law on June 9, 1998, with the following becoming AS 15.45.110(c):

A sponsor may not receive payment or agree to receive payment that is greater than \$1 a signature, and a person or an organization may not pay or agree to pay an amount that is greater than \$1 a signature, for the collection of signatures on a petition.⁴⁴

Far from Senator Sharp's original Senate Bill 313, which explicitly permitted the payment of circulators on an hourly or salary basis in excess of \$1 per signature gathered, the finally

⁴² See Senate Bill No. 313, Twentieth Legislature—Second Session (Feb. 2, 1998) (emphasis added), attached as **Exhibit A**.

⁴³ See Senate Bill No. 313 (FIN) attached to this memorandum as **Exhibit B**.

⁴⁴ See **Exhibit B at 2**.

enacted AS 15.45.110(c) explicitly prohibits by its broad terms any form of “payment” of circulators that exceeds \$1 for every signature the circulator gathered.

If there was any doubt that AS 15.45.110(c) prohibits the salary or hourly payment of circulators in excess of \$1 per signature gathered, it was eliminated in 2009. In 2009, Representatives Millett, Johansen, and Wilson introduced HB 36, which sought to amend AS 15.45.110(c) to allow the hourly or salary payment of circulators in excess of \$1 per signature gathered.⁴⁵ Specifically, House Bill 36 provided:⁴⁶

* Sec. 5. AS 15.45.110(c) is amended to read:

(c) A circulator may not receive payment or agree to receive payment [THAT IS GREATER THAN \$1 A SIGNATURE], and a person or an organization may not pay or agree to pay an amount, based on the number of registered voters who signed the petition. Nothing in this subsection prohibits a person or an organization from employing a circulator and:

(1) paying an hourly wage or salary;

(2) establishing either express or implied minimum signature requirements for the circulator;

(3) terminating the petition circulator's employment if the circulator fails to meet certain productivity requirements; or

(4) paying discretionary bonuses based on reliability, longevity, and productivity [THAT IS GREATER THAN \$1 A SIGNATURE, FOR THE COLLECTION OF SIGNATURES ON A PETITION].

⁴⁵ See House Bill No. 36, attached as Exhibit C (available at <http://www.akleg.gov/PDF/26/Bills/HB0036A.PDF>).

⁴⁶ *Id.*

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But the final version of HB 36 as enacted into law did not include any change to AS 15.45.110(c).⁴⁷ The Legislature considered modifying AS 15.45.110(c) to permit what Defendant Vote Yes says should be allowed, and rejected the hourly or salary payment of circulators in excess of \$1 per signature gathered.

In sum, Defendant Vote Yes cherry picked a statement from the sponsor of AS 15.45.110(c) based on the statutory language originally introduced, but that language was rejected by the Legislature in 1998. Instead of exempting hourly and salary payment of circulators from AS 15.45.110(c), the Legislature rejected that language and adopted the broad prohibition against any form of payment that exceeds \$1 per signature for the gathering of subscriptions. In 2009, the Legislature again considered exempting salary or hourly payment from AS 15.45.110(c)'s limitation and rejected revising AS 15.45.110(c) to permit hourly or salary payment of circulators in excess of \$1 per signature gathered.

This Court should reject Defendant Vote Yes's slanted version of legislative history, and rule that the plain language of AS 15.45.110(c) and the legislative history of that statutory provision makes clear that all forms of circulator payment are subject to AS 15.45.110(c)'s limitations.

C. Enforcing Alaska's duly enacted initiative statutes and invalidating subscriptions supported by false circulator affidavits does not "disenfranchise" Alaska voters.

Despite the Alaska Supreme Court's prior approval of the State's invalidation of

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⁴⁷ See SCS CSSH 36(JUD), attached as **Exhibit D** (available at <http://www.akleg.gov/PDF/26/Bills/HB0036Z.PDF>).

otherwise valid subscriptions in petitions because of circulator misconduct in *North West Cruiseship Association*, Defendant Vote Yes continues to complain that invalidation of subscriptions supported by false circulator affidavits in this case would amount to the “disenfranchisement of tens of thousands of Alaskans who signed the certified initiative.”⁴⁸ This is not so. This emotional rhetoric seeks to obscure the true interests at stake in this lawsuit, and has been rejected by other state supreme courts that reasoned that upholding state initiative laws is following the rule of law, not disenfranchising voters.

Several courts have rejected this precise argument. Rather than thwarting voter rights, a court that upholds the requirement that circulators provide truthful affidavits is protecting the integrity of the initiative process itself.

The Montana Supreme Court reasoned that while it was “regrettable” that some voters would feel disenfranchised, the fact remained “that if the initiative process is to remain viable and retain its integrity, those invoking it must comply with the laws passed by our Legislature. We can neither excuse nor overlook violations of these laws, for to do so here would confer free reign for others to do so in other matters. We must enforce the law as written and as the Legislature intended.”⁴⁹

The Maine Supreme Court likewise reasoned “the circulator's role in a citizens' initiative is pivotal. Indeed, the integrity of the initiative and referendum process in many

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⁴⁸ Defendant Vote Yes's Motion, at 18.

⁴⁹ *Montanans for Justice v. State ex rel. McGrath*, 146 P.3d 759, 778 (Mont. 2006).

ways hinges on the trustworthiness and veracity of the circulator.”⁵⁰ Therefore a false circulator affidavit “justif[ies] the invalidation of the petition *in toto*.”⁵¹

To be sure, the *North West Cruiseship Association* Court did use the phrase “wholesale disenfranchisement of qualified electors” in the context of approving the State’s invalidation of all signatures that were tainted by the circulator’s misconduct but accepting all other subscriptions that were not tainted by that misconduct. In *North West Cruiseship Association*, the Division of Elections invalidated pages of otherwise valid voter subscriptions in two petition booklets because the circulator neglected to include the “paid by” disclosures on those pages of the petition booklet.⁵² The Court’s reasoning was that the circulator’s failure to follow the law may have led to the collection of these subscriptions.⁵³

The same logic applies here. It is unlikely professionally paid circulators from Advanced Micro Targeting would have travelled to Alaska to gather subscriptions had Defendant Vote Yes followed AS 15.45.110(c) and compensated circulators \$1 or less for every signature gathered. By offering a monthly salary of \$3,500 - \$4,000 per month, with

⁵⁰ *Maine Taxpayers Action Network v. Secretary of State*, 795 A.2d 75, 80 (Me. 2002).

⁵¹ *Id.* The Court was bolstered in this conclusion by the fact that the Maine Legislature considered a false statement in a circulator affidavit “to be a sufficiently grave act that it has specifically criminalized the providing of a false statement in connection with a petition.” *Id.* at 81 (citing 21-A M.R.S.A. § 904 (1993)).

⁵² *North West Cruiseship Ass’n of Alaska, Inc. v. State*, 145 P.3d 573, 578 (Alaska 2006) (“The Division’s construction of its own regulations is therefore in line with our directive in *Fisher v. Stout* to seek ‘a construction . . . which avoids the wholesale disenfranchisement of qualified electors.’”) (original brackets omitted).

⁵³ *Id.* at 578.

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an expectation that circulators obtain 80-100 signatures per day, six days a week,⁵⁴ these circulators violated AS 15.45.110(c) and were able to gather enough subscriptions to place 19OGTX on the ballot. As in *North West Cruiseship Association*, this Court should make clear that in order to place an initiative on the ballot, the ballot group must *lawfully* collect and *lawfully* certify the requisite number of qualified subscriptions. No voters are being disenfranchised by the judicial system's upholding of AS 15.45.110(c) and AS 15.45.130.

D. The Court should grant Plaintiffs' motion for partial summary judgment because AS 15.45.130 prohibits the State from counting subscriptions not properly certified and the weight of American authority supports Plaintiffs' position.

Plaintiffs move this Court to grant partial summary judgment that AS 15.45.130 prohibits the lieutenant governor from counting subscriptions supported by a circulator certification (affidavit) that includes a false statement that the circulator was paid in conformance with Alaska's statutory limitation on circulator payment. The Alaska Supreme Court has reasoned that when a party seeks to establish the law that will govern the case moving forward, that motion should be styled as a "motion for partial summary judgment."⁵⁵ Plaintiffs move for partial summary judgment on the effect of false circulator affidavits under AS 15.45.130.

⁵⁴ Plaintiffs' Complaint, ¶ 22 (April 10, 2020).

⁵⁵ *Loeb v. Rasmussen*, 822 P.2d 914, 916 (Alaska 1991) (superseded by statute on comparative negligence issue unrelated to the Court's description of how to properly style a motion to establish the governing law of a case).

1. AS 15.45.130 prohibits the State from counting subscriptions supported by false circulator affidavits.

Alaska Statute 15.45.110(c) prohibits the payment of circulators in excess of \$1 per signature for the collection of subscriptions on a petition: "A circulator may not receive payment or agree to receive payment that is greater than \$1 a signature, and a person or an organization may not pay or agree to pay an amount that is greater than \$1 a signature, for the collection of signatures on a petition."⁵⁶ A "person or organization that violates [AS 15.45.110(c)] is guilty of a class B misdemeanor."⁵⁷

Importantly, AS 15.45.130 prohibits the State from counting subscriptions within petitions that are not properly certified at the time of filing and explains that certification is accomplished by the circulator submitting an affidavit that swears, among other things, that they were not illegally compensated to gather the accompanying subscriptions:

Before being filed, each petition shall be certified by an affidavit by the person who personally circulated the petition. In determining the sufficiency of the petition, the lieutenant governor may not count subscriptions on petitions not properly certified at the time of filing or corrected before the subscriptions are counted. The affidavit must state in substance . . .

(6) that the circulator has not entered into an agreement with a person or organization in violation of AS 15.45.110(c)[.]⁵⁸

Like the state statutory schemes governing the review of petition subscriptions and circulator affidavits in Montana, Ohio, Arizona, Maine and Oklahoma, discussed below,

⁵⁶ AS 15.45.110(c).

⁵⁷ AS 15.45.110(e). In Alaska, class B misdemeanors are punishable by up to 90 days in jail and a fine of up to \$2,000. See AS 12.55.035 and 12.55.135.

⁵⁸ AS 15.45.130 (emphasis added).

this provision contemplates that the lieutenant governor has the ability to investigate and invalidate petition booklets and all subscriptions contained therein if they are supported by a false circulator affidavit.⁵⁹

Untruthful statements in a circulator affidavit do not “properly certify” the accompanying petition booklet. AS 15.45.130 prohibits the lieutenant governor from counting signatures within petition booklets if the petition booklet is not “properly certified” when the petition is filed. The statute lists eight requirements that a petition circulator must swear to in his or her affidavit. One of those required certifications is that the circulator has not entered into an agreement with a person or organization in violation of the prohibition on paying circulators in excess of \$1 per signature, for the collection of signatures.⁶⁰ The purpose of the affidavit requirement is to ensure truthful answers, and an untruthful affidavit does not “properly certify” the accompanying petition. Alaska statute *prohibits* the lieutenant governor from counting signatures contained in a petition

⁵⁹ See e.g. *Montanans for Justice v. State ex rel. McGrath*, 146 P.3d 759, 777 (Mont. 2006) (citing Mont. Code Ann. § 13-27-307 which simply states the secretary of state may “reject any petition that does not meet statutory requirements.”); *Maine Taxpayers Action Network v. Secretary of State*, 795 A.2d 75, 79-80 (Me. 2002) (“The Secretary is vested with the authority to determine whether any petition filed in support of a citizens initiative is valid. The statute does not provide specific grounds for invalidating a signature, but provides broadly that ‘the Secretary of State shall determine the validity of the petition and issue a written decision stating the reasons for the decision. ...’ Accordingly, we have recognized that the Secretary may disqualify signatures for a failure to follow the requirements of the Constitution or its statutory overlay.”) (internal brackets and citations omitted).

⁶⁰ AS 15.45.130(6).

that is not properly certified.⁶¹ Most other states that have wrestled with this issue come to the same conclusion.

2. The weight of American authority supports plaintiffs' position.

The weight of authority from state supreme courts confirms that invalidation of all subscriptions supported by a false circulator affidavit is the appropriate remedy. These courts reason that their state's criminalization of false statements in circulator affidavits shows that invalidation of all signatures supported by the false certification is the appropriate remedy because the legislature found the certification to be a sufficiently grave act to make its violation a crime. Moreover, there is no case supporting Defendant Vote Yes's argument that because there is no statute specifically detailing how the lieutenant governor or Division of Elections is to conduct an inquiry into the veracity of a circulator affidavit, that the lieutenant governor may not invalidate signatures gathered by a circulator who lies in his circulator affidavit about how he gathered the subscriptions.

State Defendants and Defendant Vote Yes urge this Court to adopt the reasoning of the Missouri Supreme Court's decision over forty years ago in *United Labor Committee of Missouri v. Kirkpatrick*⁶² as persuasive precedent that supports their position in this litigation. But the decision of that divided court is an outlier. It was decided before numerous other state supreme courts looked at this issue and held that petition subscriptions should not be counted if they are supported by a false circulator affidavit.

⁶¹ AS 15.45.130.

⁶² *United Labor Committee of Missouri v. Kirkpatrick*, 572 S.W.2d 449 (Mo. 1978).

In *Kirkpatrick*, a sharply divided (4-3) Missouri Supreme Court refused to invalidate all of the signatures contained in petitions which were supported by circulator affidavits that were signed outside the presence of a notary and notarized later and contained signatures collected by someone else other than the circulator.⁶³ Four members of the Missouri Supreme Court were in the majority. These justices declined to invalidate the signatures based on the incorrect premise that the only interest the circulator affidavit served was to facilitate the accurate determination of whether a "sufficient number of registered voters deem an issue important enough that the issue should be put to a vote before the people."⁶⁴ Ignoring that the obvious purpose of the numerous Missouri statutes governing circulator affidavits and notarization of the petition booklets was to set rules on how circulators may gather subscription signatures, the four member majority concluded that Missouri's criminal law for willful violations of the initiative statutes was sufficient to vindicate Missouri's initiative laws.⁶⁵ Three members of the court, including the Chief Justice, dissented and criticized the majority for ignoring the obvious purpose of the statutory rules was to protect the initiative process and the mandatory nature of these rules.⁶⁶

⁶³ *Id.* at 450-51.

⁶⁴ *Id.* at 453.

⁶⁵ *Id.* at 456-57.

⁶⁶ *Id.* at 457 (Morgan, C.J., dissenting).

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A much greater weight of authority from other states supports Plaintiffs' position. In *Brousseau v. Fitzgerald*,⁶⁷ the Arizona Supreme Court rejected the approach taken six years earlier by the Missouri Supreme Court because that approach nullified the rules the legislature passed to govern how subscriptions were gathered in the first place.⁶⁸ The defendant was an Arizona resident seeking to collect enough signatures (632 signatures) to gain access to the Democratic primary election for the office of Mayor of the City of Tucson.⁶⁹ Arizona statutes required circulators to be eligible Arizona voters and to witness each subscriber sign the petition.⁷⁰

The defendant submitted 1,000 signatures along with an affidavit swearing he had personally collected the signatures.⁷¹ But the evidence at trial showed that non-residents and minors had actually collected the signatures, not the defendant.⁷² Nevertheless, when the City of Tucson checked the gathered signatures, there were more than enough valid subscriptions from proper voters for the defendant to meet the threshold and get his name on the ballot.⁷³

⁶⁷ *Brousseau v. Fitzgerald*, 675 P.2d 713 (Ariz. 1984).

⁶⁸ *Id.* at 715.

⁶⁹ *Id.* at 714.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 715.

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A unanimous Arizona Supreme Court rejected the defendant's argument that so long as the subscriber signatures were valid then the “substance—allowing the will of the people to be expressed through their actual nominating signatures—is more important than fulfilling technical procedures.”⁷⁴ To the contrary, the *Brousseau* court concluded that a circulator's submission of a false affidavit undermines the careful initiative process crafted by the legislature to obtain ballot access:

Defects either in circulation or signatures deal with matters of form and procedure, but the filing of a false affidavit by a circulator is a much more serious matter involving more than a technicality. The legislature has sought to protect the process by providing some safeguards in the way nomination signatures are obtained and verified. Fraud in the certification destroys the safeguards unless there are strong sanctions for such conduct such as voiding of petitions with false certifications.⁷⁵

The court held that “petitions containing false certifications by circulators are void, and the signatures on such petitions may not be considered in determining the sufficiency of the number of signatures to qualify for placement on the ballot.”⁷⁶ Arizona has separate, criminal sanctions for filing a false circulator affidavit,⁷⁷ and continues to apply *Brousseau* to invalidate subscriptions supported by false circulator affidavits.⁷⁸

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 716.

⁷⁷ See Arizona Revised Statute § 19-118.

⁷⁸ See *Ross v. Bennett*, 265 P.3d 356, 362 (Ariz. 2011) (discussing *Brousseau*'s continued viability and describing its core holding as “Petition sheets bearing false or fraudulent circulator affidavits are void.”); see also *Parker v. City of Tucson*, 314 P.3d 100, 116 (Ariz. App. Ct. 2013) (“The false affidavits rendered the signature sheets void. *Brousseau*, 675 P.2d at 716.”).

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The Ohio Supreme Court reached the same conclusion as the Arizona Supreme Court. In *State ex rel. Schmelzer v. Board of Elections of Cuyahoga County*,⁷⁹ a circulator falsely affirmed in her affidavit that she was a registered Ohio voter to comply with a state statute that permitted only registered Ohio voters to serve as circulators.⁸⁰ The local county board of elections invalidated the 52 signatures collected by this circulator, leaving the candidate seeking ballot access 19 signatures below the threshold.⁸¹ The candidate appealed the decision to the Ohio state courts, and argued that invalidation of voter signatures collected by an unqualified circulator was unduly harsh and a hyper technical application of Ohio's statute setting circulator requirements.⁸² The Ohio Supreme Court noted the criminal penalty in Ohio for a circulator's submission of a false affidavit and rejected the argument that the circulator's misconduct should have no effect on voters' subscriptions on her petition: "[W]e view this error not as a technical defect but as a substantial and fatal omission of a specific statutory requirement."⁸³

The Maine Supreme Court reached the same conclusion in *Maine Taxpayers Action Network v. Secretary of State*.⁸⁴ There, the court was tasked with reviewing the state's decision to invalidate 3,054 signatures in support of an initiative to limit real and personal

⁷⁹ *State ex rel. Schmelzer v. Board of Elections of Cuyahoga County*, 440 N.E.2d 801 (Ohio 1982).

⁸⁰ *Id.* at 802-03.

⁸¹ *Id.* at 801.

⁸² *Id.* at 802.

⁸³ *Id.* at 803.

⁸⁴ *Maine Taxpayers Action Network v. Secretary of State*, 795 A.2d 75 (Me. 2002).

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property taxes in Maine that were collected by a circulator that stole another's identity, and falsely swore in his circulator affidavit as to his identity and that he was a Maine resident.⁸⁵ Invalidation of all of the signatures collected by the circulator left the initiative 2,812 signatures short of the threshold to reach the ballot.⁸⁶ On appeal, the Maine Supreme Court started by recognizing that direct initiatives are "core political speech" and that the U.S. Supreme Court had taught that "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."⁸⁷ The court also noted that the legislature had "criminalized the providing of a false statement in connection with a petition" by making it a "Class E crime."⁸⁸ The court ultimately concluded that because of the crucial role circulators play in the initiative process, a false circulator affidavit rendered all signatures collected by that circulator invalid:

[T]he circulator's role in a citizens' initiative is pivotal. Indeed, the integrity of the initiative and referendum process in many ways hinges on the trustworthiness and veracity of the circulator. In reviewing the signatures gathered by the circulators, the Secretary has the ability to verify through municipal records that a signing voter is actually registered and therefore permitted to vote. In contrast, the Secretary has no way, without engaging in a separate investigation, to verify that a signing voter actually signed the petition. Thus, the circulator's oath is critical to the validation of a petition. Indeed the oath is of such importance that the Constitution requires it be sworn in the presence of a notary public. . . . In addition to obtaining truthful information from the circulator, the oath is intended to assure that the

⁸⁵ *Id.* at 77.

⁸⁶ *Id.*

⁸⁷ *Id.* at 79 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

⁸⁸ *Id.* at 81.

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circulator is impressed with the seriousness of his or her obligation to honesty, and to assure that the person taking the oath is clearly identified should questions arise regarding particular signatures. As early as 1917, we held that verification of the signatures and the subsequent oath taken by the circulator is an “indispensable accompaniment of a valid petition,” and, accordingly, that the invalidation of signatures lacking this prerequisite is necessary to preserve the integrity of the initiative and referendum process.⁸⁹

The court therefore invalidated all of the signatures contained in these petition booklets “*in toto*.”⁹⁰

The Montana Supreme Court likewise upheld the state attorney general's invalidation of signatures in support of three ballot initiatives that were collected by circulators who falsely swore to the location of their physical addresses in Montana⁹¹ and that they had personally viewed all subscribers sign the petition.⁹² The circulators had also likely employed a “bait and switch” tactic to induce people who knowingly signed one petition to unknowingly sign the other two.⁹³ The court upheld invalidation of 64,463 of the 125,609 total signatures collected by these circulators, which resulted in the

⁸⁹ *Id.* at 80 (internal citations and brackets omitted).

⁹⁰ *Id.*

⁹¹ *Montanans for Justice v. State ex rel McGrath*, 146 P.3d 759, 773-75 (Mont. 2006). Montana Code Annotated § 13-27-302 lists the requirements of circulator affidavits. One of those requirements is that the circulator list the address of the petition signature gatherer. In *Montanans for Justice*, the 43 out-of-state circulators at issue in that case used false or fictitious addresses in Montana in their circulator affidavits. *Id.* at 773. “[S]ome of the provided addresses were hotels, retail stores or shopping centers; some were apartment complexes or personal residences at which the signature gatherer was not listed as a resident, and some addresses simply did not exist.” *Id.* at 773.

⁹² *Id.* at 770-73.

⁹³ *Id.* at 775-76.

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decertification of all three initiatives from the statewide ballot.⁹⁴ The court reasoned that this was necessary to protect the careful initiative requirement adopted by the legislature:

We acknowledge that many voters feel strongly that they should have the opportunity to vote on one or more of these initiatives, and that these people will feel disenfranchised by our decision. This is extremely regrettable. The fact remains, however, that if the initiative process is to remain viable and retain its integrity, those invoking it must comply with the laws passed by our Legislature.⁹⁵

The Montana Supreme Court expressly considered and rejected the holding of the Missouri Supreme Court in *United Labor Committee of Missouri v. Kirkpatrick* that so long as the state can verify the veracity the authenticity of subscription signatures, the petition should not be invalidated regardless of the conduct of the circulators.⁹⁶

The Oklahoma Supreme Court has ruled in accord with the cases above. In *In re Initiative Petition No. 379, State Question No. 726*,⁹⁷ that court struck all signatures (57,850 in total) gathered by circulators employed by a Nevada petition company, National Voter Outreach (“NVO”), in support of a citizen taxpayer bill of rights initiative because those circulators falsely stated in their affidavits that they were “a qualified elector of the State of Oklahoma” when none of them were even Oklahoma residents.⁹⁸ The court reasoned that the Oklahoma legislature's enactment of criminal sanctions for false

⁹⁴ *Id.* at 771 & n. 4.

⁹⁵ *Id.* at 778.

⁹⁶ *Id.* at 770.

⁹⁷ *In re Initiative Petition No. 379, State Question No. 726*, 155 P.3d 32 (Okla. 2006).

⁹⁸ *Id.* at 47-48.

circulator affidavits (punishable by up to \$1,000.00 and a year in county jail) made invalidation of all signatures gathered by those circulators the appropriate remedy.⁹⁹ Far from disenfranchising voters, that remedy upholds the integrity of the initiative process enacted in law:

Excluding all petitions associated with the [] initiative does not disenfranchise voters. Rather, it upholds the integrity of the initiative process that has been undermined by criminal wrongdoing and fraud. The Legislature has imposed strong sanctions for such wrongdoing. NVO and its out-of-state circulators committed much more than mere technical violations of Oklahoma law—they attempted to destroy the safeguards by which signatures are obtained and verified. Nothing less than the strong sanction of voiding the entire petition will serve to deter similar activity in the future and to protect the precious right of the initiative to Oklahoma voters.¹⁰⁰

Because the voiding of all petitions supported by false circulator affidavits reduced the number of qualified subscribers below the required threshold, the court ruled “the petition fails for numerical insufficiency.”¹⁰¹

In 2016, the Arkansas Supreme Court invalidated 1,040 voter subscriptions and ordered the initiative stay off the election ballot because circulators did not disclose, prior to gathering signatures, that they were getting paid to collect signatures. In *Benca v. Martin*, an Arkansas statute required paid circulators to submit an affidavit to the secretary of state *prior* to gathering subscriptions.¹⁰² The same statute admonished: “[s]ignatures

⁹⁹ *Id.* at 41-42.

¹⁰⁰ *Id.* at 49-50.

¹⁰¹ *Id.* at 50.

¹⁰² *Benca v. Martin*, 500 S.W.3d 742 (Ark. 2016).

incorrectly obtained or submitted under this section shall not be counted by the Secretary of State.”¹⁰³ Several circulators collected valid signatures but did so before they filed their affidavits with the secretary of state.¹⁰⁴ Like the state officials in this case, the Arkansas secretary of state refused to invalidate the otherwise valid signatures of Arkansas voters who were in favor of putting the legalization of medical marijuana on the ballot.¹⁰⁵ Arkansas lawyer Kara Benca sued the Secretary of State to invalidate the petitions.¹⁰⁶

The Arkansas Supreme Court granted Benca's petition and invalidated enough subscriptions to keep the initiative off the ballot. The court noted that the statutory language was mandatory that the secretary of state “shall not” count subscriptions incorrectly obtained or submitted.¹⁰⁷ Therefore, the court ruled that the initiative lacked the sufficient number of valid subscriptions, and issued a mandate that the secretary of state keep the medical marijuana initiative off the upcoming ballot.¹⁰⁸

This Court should adopt the reasoning of the majority of other state supreme courts that have decided this issue, and grant Plaintiffs partial summary judgment that AS 15.45.130 prohibits the State from counting subscriptions supported by a circulator affidavit that contains a false statement that the circulator was paid in conformance with

¹⁰³ *Id.* at 748-49.

¹⁰⁴ *Id.* at 748.

¹⁰⁵ *Id.* at 744.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 748-49.

¹⁰⁸ *Id.* at 744, 750.

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Alaska law. Circulators hold a special place of importance in the initiative process. As such, circulators must be held to follow Alaska law and support the subscriptions they have gathered with a truthful affidavit.

IV. CONCLUSION

For the foregoing reasons, this Court should deny Defendant Vote Yes's Motion to Dismiss, and grant Plaintiffs' motion for partial summary judgment that AS 15.45.130 prohibits the State from counting subscriptions that are supported by a circular affidavit that contains a false statement regarding compliance with AS 15.45.110(c).

DATED at Anchorage, Alaska this 2nd day of June, 2020.

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OPPOSITION TO DEFENDANT VOTE YES FOR ALASKA'S FAIR SHARE'S MOTION TO DISMISS
AND CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT
DEVELOPMENT COUNCIL, INC. ET AL. V. FENUMAI AND DIVISION OF ELECTIONS
CASE NO. 3AN-20-05901 CI

PAGE 33 OF 34

EXC 150

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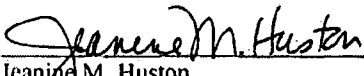
CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of June, 2020, a true and correct copy of the foregoing was served by email upon the following:

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OPPOSITION TO DEFENDANT VOTE YES FOR ALASKA'S FAIR SHARE'S MOTION TO DISMISS
AND CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT
DEVELOPMENT COUNCIL, INC. ET AL. V. FENUMIAI AND DIVISION OF ELECTIONS
CASE NO. 3AN-20-05901 CI

PAGE 34 OF 34

SENATE BILL NO. 313

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - SECOND SESSION

BY SENATOR SHARP

Introduced: 2/16/98

Referred: Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to sponsor certification of initiative petitions; relating to sponsor
2 identification during petition circulation; relating to the voidability of an initiated
3 law; placing limitations on the compensation that may be paid to sponsors of
4 initiative petitions; prohibiting payments to persons who sign or refrain from
5 signing initiative petitions; and repealing procedures for filing a supplementary
6 initiative petition."

7 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

8 * **Section 1.** AS 15.45.110 is amended by adding new subsections to read:

9 (b) A sponsor shall display identification containing the sponsor's name when
10 circulating a petition.

11 (c) A sponsor may not receive payment or agree to receive payment, and a
12 person or an organization may not pay or agree to pay, for the collection of signatures
13 on a petition if any part of the payment is based on the number of signatures collected.

1 This subsection does not prohibit a sponsor from being paid an amount that is not
2 based on the number of signatures collected.

3 (d) A person or organization may not knowingly pay, offer to pay, or cause
4 to be paid money or other valuable thing to a person to sign or refrain from signing
5 a petition.

6 (e) A person or organization that violates (b) - (d) of this section is guilty of
7 a class B misdemeanor.

8 (f) In this section,

9 (1) "organization" has the meaning given in AS 11.81.900;

10 (2) "other valuable thing" has the meaning given in AS 15.56.030(d);

11 (3) "person" has the meaning given in AS 11.81.900.

12 * Sec. 2. AS 15.45.130 is amended to read:

13 **Sec. 15.45.130. Certification of sponsor.** Before being filed, each petition
14 shall be certified by an affidavit by the sponsor who personally circulated the petition.
15 The affidavit must [SHALL] state in substance that (1) the person signing the affidavit
16 is a sponsor, (2) the person is the only circulator of that petition, (3) the signatures
17 were made in the sponsor's actual presence, [AND] (4) to the best of the sponsor's
18 knowledge, the signatures are those of the persons whose names they purport to be,
19 (5) the signatures are of persons who were qualified voters on the date of
20 signature, (6) the person has not entered into an agreement with a person or
21 organization in violation of AS 15.45.110(c), and (7) the person has not violated
22 AS 15.45.110(d) with respect to that petition. In determining the sufficiency of the
23 petition, the lieutenant governor may not count subscriptions on petitions not properly
24 certified.

25 * Sec. 3. AS 15.45.190 is amended to read:

26 **Sec. 15.45.190. Placing proposition on ballot.** The lieutenant governor shall
27 direct the director to place the ballot title and proposition on the election ballot of the
28 first statewide general, special, or primary election that is held after

29 (1) the petition has [AND ANY SUPPLEMENTARY PETITION
30 HAVE] been filed; [,]

31 (2) a legislative session has convened and adjourned; [,] and

1 (3) a period of 120 days has expired since the adjournment of the
2 legislative session.

3 * Sec. 4. AS 15.45.240 is amended to read:

4 Sec. 15.45.240. **Judicial review.** Any person aggrieved by a determination
5 made by the lieutenant governor under AS 15.45.010 - 15.45.220 [AS 15.45.010 -
6 15.45.230] may bring an action in the superior court to have the determination
7 reviewed within 30 days of the date on which notice of the determination was given.

8 * Sec. 5. AS 15.56.090(a) is amended to read:

9 (a) A person commits the crime of improper subscription to petition if the
10 person

11 (1) signs a name other than the person's own to a petition proposing an
12 initiative, referendum, recall, or nomination of a candidate for state or local office;

13 (2) knowingly signs more than once for the same proposition, question,
14 or candidate at one election; [OR]

15 (3) signs a petition proposing an initiative, referendum, recall, or
16 nomination of a candidate for state or local office, while knowingly not being a
17 qualified voter; or

18 (4) solicits, accepts, or agrees to accept money or other valuable
19 thing in exchange for signing or refraining from signing a petition proposing an
20 initiative; in this paragraph, "other valuable thing" has the meaning given in
21 AS 15.56.030(d).

22 * Sec. 6. AS 15.45.170 and 15.45.230 are repealed.

23 * Sec. 7. APPLICABILITY. (a) AS 15.45.110(b), as enacted by sec. 1 of this Act, applies
24 only to sponsors of petitions that arise from an initiative application that is certified under
25 AS 15.45.070 on or after the effective date of this Act.

26 (b) AS 15.45.110 (c) - (f), as enacted by sec. 1 of this Act, apply only to agreements
27 entered into, payments under agreements entered into, and offers made on or after the effective
28 date of this Act.

29 (c) AS 15.45.130, as amended by sec. 2 of this Act, applies only to affidavits required
30 for filing of a petition that is certified under AS 15.45.070 on or after the effective date of this
31 Act.

1 (d) AS 15.56.090(a), as amended by sec. 5 of this Act, applies only to solicitations,
2 acceptances, or agreements made on or after the effective date of this Act.

3 (e) The amendment to AS 15.45.190 made by sec. 3 of this Act and the repeal of
4 AS 15.45.230 made by sec. 6 of this Act apply only to petitions that arise from an initiative
5 application that is certified under AS 15.45.070 on or after the effective date of this Act.

6 (f) The amendment to AS 15.45.240 made by sec. 4 of this Act and the repeal of
7 AS 15.45.170 made by sec. 6 of this Act apply only to initiatives that arise from an initiative
8 application that is certified under AS 15.45.070 on or after the effective date of this Act.

HOUSE CS FOR SENATE BILL NO. 313(FIN)
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTIETH LEGISLATURE - SECOND SESSION

BY THE HOUSE FINANCE COMMITTEE

Offered: 5/10/98
Referred: Rules

Sponsor(s): SENATOR SHARP

A BILL
FOR AN ACT ENTITLED

1 "An Act relating to sponsor certification of initiative petitions; relating to sponsor
2 identification during petition circulation; relating to the voidability of an initiated
3 law; placing limitations on the compensation that may be paid to sponsors of
4 initiative petitions; prohibiting payments to persons who sign or refrain from
5 signing initiative petitions; and repealing procedures for filing a supplementary
6 initiative petition."

7 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

8 * **Section 1.** AS 15.45.090 is amended to read:

9 **Sec. 15.45.090. Preparation of petition.** If the application is certified, the
10 lieutenant governor shall prescribe the form of and prepare petitions containing (1) a
11 copy of the proposed bill [,] if the number of words included in both the formal and
12 substantive provisions of the bill is 500 or less, (2) an impartial summary of the
13 subject matter of the bill, (3) the warning prescribed in AS 15.45.100, (4) sufficient

space for signature and address, [AND] (5) sufficient space at the bottom of each page for the information required by AS 15.45.130(8), and (6) other specifications prescribed by the lieutenant governor to assure proper handling and control. Petitions, for purposes of circulation, shall be prepared by the lieutenant governor in a number reasonably calculated to allow full circulation throughout the state. The lieutenant governor shall number each petition and shall keep a record of the petition delivered to each sponsor. Upon request of the committee, the lieutenant governor shall report the number of persons who voted in the preceding general election.

* Sec. 2. AS 15.45.110 is amended by adding new subsections to read:

(b) A sponsor shall display identification containing the sponsor's name when circulating a petition.

(c) A sponsor may not receive payment or agree to receive payment that is greater than \$1 a signature, and a person or an organization may not pay or agree to pay an amount that is greater than \$1 a signature, for the collection of signatures on a petition.

(d) A person or organization may not knowingly pay, offer to pay, or cause to be paid money or other valuable thing to a person to sign or refrain from signing a petition.

(e) A person or organization that violates (b) - (d) of this section is guilty of a class B misdemeanor.

(f) In this section,

(1) "organization" has the meaning given in AS 11.81.900;

(2) "other valuable thing" has the meaning given in AS 15.56.030(d);

(3) "person" has the meaning given in AS 11.81.900.

* Sec. 3. AS 15.45.130 is amended to read:

Sec. 15.45.130. Certification of sponsor. Before being filed, each petition shall be certified by an affidavit by the sponsor who personally circulated the petition. The affidavit must [SHALL] state in substance that (1) the person signing the affidavit is a sponsor, (2) the person is the only circulator of that petition, (3) the signatures were made in the sponsor's actual presence, [AND] (4) to the best of the sponsor's knowledge, the signatures are those of the persons whose names they purport to be,

1 (5) the signatures are of persons who were qualified voters on the date of
 2 signature, (6) the person has not entered into an agreement with a person or
 3 organization in violation of AS 15.45.110(c), (7) the person has not violated
 4 AS 15.45.110(d) with respect to that petition, and (8) the sponsor prominently
 5 placed, in the space provided under AS 15.45.090(5) before circulation of the
 6 petition, in bold capital letters, the sponsor's name and, if the sponsor has
 7 received payment or agreed to receive payment for the collection of signatures on
 8 the petition, the name of each person or organization that has paid or agreed to
 9 pay the sponsor for collection of signatures on the petition. In determining the
 10 sufficiency of the petition, the lieutenant governor may not count subscriptions on
 11 petitions not properly certified.

12 * Sec. 4. AS 15.45.190 is amended to read:

13 **Sec. 15.45.190. Placing proposition on ballot.** The lieutenant governor shall
 14 direct the director to place the ballot title and proposition on the election ballot of the
 15 first statewide general, special, or primary election that is held after

16 (1) the petition has [AND ANY SUPPLEMENTARY PETITION
 17 HAVE] been filed; [,]

18 (2) a legislative session has convened and adjourned; [,] and

19 (3) a period of 120 days has expired since the adjournment of the
 20 legislative session.

21 * Sec. 5. AS 15.45.240 is amended to read:

22 **Sec. 15.45.240. Judicial review.** Any person aggrieved by a determination
 23 made by the lieutenant governor under AS 15.45.010 - 15.45.220 [AS 15.45.010 -
 24 15.45.230] may bring an action in the superior court to have the determination
 25 reviewed within 30 days of the date on which notice of the determination was given.

26 * Sec. 6. AS 15.56.090(a) is amended to read:

27 (a) A person commits the crime of improper subscription to petition if the
 28 person

29 (1) signs a name other than the person's own to a petition proposing an
 30 initiative, referendum, recall, or nomination of a candidate for state or local office;

31 (2) knowingly signs more than once for the same proposition, question,

1 or candidate at one election; [OR]

2 (3) signs a petition proposing an initiative, referendum, recall, or
3 nomination of a candidate for state or local office, while knowingly not being a
4 qualified voter; or

5 (4) solicits, accepts, or agrees to accept money or other valuable
6 thing in exchange for signing or refraining from signing a petition proposing an
7 initiative; in this paragraph, "other valuable thing" has the meaning given in
8 AS 15.56.030(d).

9 * Sec. 7. AS 15.45.170 and 15.45.230 are repealed.

10 * Sec. 8. APPLICABILITY. (a) AS 15.45.110(b), as enacted by sec. 2 of this Act, applies
11 only to sponsors of petitions that arise from an initiative application that is certified under
12 AS 15.45.070 on or after the effective date of this Act.

13 (b) AS 15.45.110(c) - (f), as enacted by sec. 2 of this Act, apply only to agreements
14 entered into, payments under agreements entered into, and offers made on or after the effective
15 date of this Act.

16 (c) AS 15.45.130, as amended by sec. 3 of this Act, applies only to affidavits required
17 for filing of a petition that is certified under AS 15.45.070 on or after the effective date of this
18 Act.

19 (d) AS 15.56.090(a), as amended by sec. 6 of this Act, applies only to solicitations,
20 acceptances, or agreements made on or after the effective date of this Act.

21 (e) The amendment to AS 15.45.190 made by sec. 4 of this Act and the repeal of
22 AS 15.45.170 made by sec. 7 of this Act apply only to petitions that arise from an initiative
23 application that is certified under AS 15.45.070 on or after the effective date of this Act.

24 (f) The amendment to AS 15.45.240 made by sec. 5 of this Act and the repeal of
25 AS 15.45.230 made by sec. 7 of this Act apply only to initiatives that arise from an initiative
26 application that is certified under AS 15.45.070 on or after the effective date of this Act.

HOUSE BILL NO. 36

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SIXTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVES JOHANSEN, MILLETT, AND WILSON

Introduced: 1/20/09

Referred: State Affairs, Judiciary

A BILL

FOR AN ACT ENTITLED

1 **"An Act prohibiting initiatives that are substantially similar to those that failed within**
2 **the previous two years; relating to financial disclosure reporting dates for persons,**
3 **groups, and nongroup entities that expend money in support of or in opposition to**
4 **initiatives, initiative information contained in election pamphlets, initiative petitions,**
5 **initiative petition circulators, and public hearings for initiatives; and requiring a**
6 **standing committee of the legislature to consider initiatives scheduled for appearance on**
7 **the election ballot."**

8 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

9 * **Section 1.** AS 15.13.110(e) is amended to read:

10 (e) A group formed to sponsor [AN INITIATIVE,] a referendum or a recall
11 shall report 30 days after its first filing with the lieutenant governor. Thereafter, each
12 group shall report within 10 days after the end of each calendar quarter on the
13 contributions received and expenditures made during the preceding calendar quarter

1 until reports are due under (a) of this section.

2 * **Sec. 2.** AS 15.13.110 is amended by adding a new subsection to read:

3 (g) An initiative committee, person, group, or nongroup entity receiving
4 contributions exceeding \$500 or making expenditures exceeding \$500 in a calendar
5 year in support of or in opposition to an initiative shall report within 10 days after the
6 end of each calendar quarter on the contributions received and expenditures made
7 during the preceding calendar quarter until reports are due under (a) and (b) of this
8 section. If the report is a first report, it must cover the period beginning on the day an
9 application is filed under AS 15.45.020 and ending three days before the due date of
10 the report.

11 * **Sec. 3.** AS 15.45.010 is amended by adding a new subsection to read:

12 (b) An initiative may not be proposed that is substantially similar to an
13 initiative appearing on the ballot during the previous two years that did not receive a
14 majority of votes in favor of its adoption.

15 * **Sec. 4.** AS 15.45.090(a) is amended to read:

16 (a) If the application is certified, the lieutenant governor shall prepare a
17 sufficient number of sequentially numbered petitions to allow full circulation
18 throughout the state. Each petition must contain

19 (1) a copy of the proposed bill [IF THE NUMBER OF WORDS
20 INCLUDED IN BOTH THE FORMAL AND SUBSTANTIVE PROVISIONS OF
21 THE BILL IS 500 OR LESS];

22 (2) an impartial summary of the subject matter of the bill;

23 (3) a statement of minimum costs to the state associated with
24 certification of the initiative application and review of the initiative petition, excluding
25 legal costs to the state and the costs to the state of any challenge to the validity of the
26 petition;

27 (4) an estimate of the cost to the state of implementing the proposed
28 law;

29 (5) the statement of warning prescribed in AS 15.45.100;

30 (6) sufficient space for the printed name, a numerical identifier, the
31 signature, the date of signature, and the address of each person signing the petition;

1 and

2 (7) other specifications prescribed by the lieutenant governor to ensure
3 proper handling and control.

4 * **Sec. 5.** AS 15.45.110(c) is amended to read:

5 (c) A circulator may not receive payment or agree to receive payment [THAT
6 IS GREATER THAN \$1 A SIGNATURE], and a person or an organization may not
7 pay or agree to pay an amount, based on the number of registered voters who
8 signed the petition. Nothing in this subsection prohibits a person or an
9 organization from employing a circulator and:

10 (1) paying an hourly wage or salary;

11 (2) establishing either express or implied minimum signature
12 requirements for the circulator;

13 (3) terminating the petition circulator's employment if the
14 circulator fails to meet certain productivity requirements; or

15 (4) paying discretionary bonuses based on reliability, longevity,
16 and productivity [THAT IS GREATER THAN \$1 A SIGNATURE, FOR THE
17 COLLECTION OF SIGNATURES ON A PETITION].

18 * **Sec. 6.** AS 15.45.110 is amended by adding a new subsection to read:

19 (g) A circulator may not concurrently solicit signatures for more than one
20 petition.

21 * **Sec. 7.** AS 15.45.130 is amended to read:

22 **Sec. 15.45.130. Certification of circulator.** Before being filed, each petition
23 shall be certified by an affidavit by the person who personally circulated the petition.
24 In determining the sufficiency of the petition, the lieutenant governor may not count
25 subscriptions on petitions not properly certified at the time of filing or corrected before
26 the subscriptions are counted. The affidavit must state in substance

27 (1) that the person signing the affidavit meets the residency, age, and
28 citizenship qualifications for circulating a petition under AS 15.45.105;

29 (2) that the person is the only circulator of that petition;

30 (3) that the signatures were made in the circulator's actual presence;

31 (4) that, to the best of the circulator's knowledge, the signatures are the

signatures of the persons whose names they purport to be;

(5) that, to the best of the circulator's knowledge, the signatures are of persons who were qualified voters on the date of signature;

(6) that the circulator has not entered into an agreement with a person or organization in violation of AS 15.45.110(c); and

(7) that the circulator has not violated AS 15.45.110(d) or (g) with respect to that petition [; AND

(8) WHETHER THE CIRCULATOR HAS RECEIVED PAYMENT OR AGREED TO RECEIVE PAYMENT FOR THE COLLECTION OF SIGNATURES ON THE PETITION, AND, IF SO, THE NAME OF EACH PERSON OR ORGANIZATION THAT HAS PAID OR AGREED TO PAY THE CIRCULATOR FOR COLLECTION OF SIGNATURES ON THE PETITION].

* **Sec. 8.** AS 15.45 is amended by adding a new section to read:

Sec. 15.45.135. Public hearings. The sponsors shall hold public hearings in at least 30 house districts within one year after the application is certified by the lieutenant governor under AS 15.45.070.

* **Sec. 9.** AS 15.58.010 is amended to read:

Sec. 15.58.010. Election pamphlet. Before each state general election, and before each state primary or special election at which a ballot proposition is scheduled to appear on the ballot, the lieutenant governor shall prepare, publish, and mail at least one election pamphlet to each household identified from the official registration list. The pamphlet shall be prepared on a regional basis as determined by the lieutenant governor.

* **Sec. 10.** AS 15.58.020(b) is amended to read:

(b) Each primary or special election pamphlet shall contain only the information specified in (a)(6) and (a)(9) of this section for each ballot measure scheduled to appear on the primary election ballot.

* **Sec. 11.** AS 15.58.060 is amended by adding a new subsection to read:

(d) The qualified voters designated as sponsors of an initiative under AS 15.45.060 shall pay to the lieutenant governor the printing costs, including the cost of printing the full text of the initiative in election pamphlets, as required under

1 AS 15.58.020(a)(6)(A) and AS 15.58.020(b).

2 * **Sec. 12.** AS 24.05 is amended by adding a new section to article 4 to read:

3 **Sec. 24.05.186. Review of initiatives certified by the lieutenant governor by**
4 **standing committees of the legislature.** (a) A standing committee of the legislature
5 shall consider an initiative that the lieutenant governor has determined was properly
6 filed under AS 15.45.160.

7 (b) A standing committee shall conduct reviews under this section within 30
8 days after the convening of the legislative session preceding the statewide election at
9 which the initiative proposition must appear on the election ballot under
10 AS 15.45.190.

11 * **Sec. 13.** The uncodified law of the State of Alaska is amended by adding a new section to
12 read:

13 **APPLICABILITY.** This Act applies to an initiative for which the application was filed
14 with the lieutenant governor under AS 15.45.020 on or after the effective date of this Act.



LAWS OF ALASKA

2010

Source

SCS CSSSHB 36(JUD)

Chapter No.

AN ACT

Relating to ballot initiative proposal applications, to ballot initiatives and to those who file or organize for the purpose of filing a ballot initiative proposal, and to election pamphlet information relating to certain propositions.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

THE ACT FOLLOWS ON PAGE 1

AN ACT

1 Relating to ballot initiative proposal applications, to ballot initiatives and to those who file or
2 organize for the purpose of filing a ballot initiative proposal, and to election pamphlet
3 information relating to certain propositions.

4
5 * **Section 1.** AS 15.13.040(k) is amended to read:

6 (k) Every individual, person, nongroup entity, or group contributing a total of
7 \$500 or more to a group organized for the principal purpose of influencing the
8 outcome of a proposition, **and every individual, person, nongroup entity, or group**
9 **contributing a total of \$500 or more to a group organized for the principal**
10 **purpose of filing an initiative proposal application under AS 15.45.020 or that has**
11 **filed an initiative proposal application under AS 15.45.020,** shall report the
12 contribution or contributions on a form prescribed by the commission not later than 30
13 days after the contribution that requires the contributor to report under this subsection
14 is made. The report must include the name, address, principal occupation, and

1 employer of the individual filing the report and the amount of the contribution, as well
2 as the total amount of contributions made to that group by that individual, person,
3 nongroup entity, or group during the calendar year.

4 * **Sec. 2.** AS 15.13.050(a) is amended to read:

5 (a) Before making an expenditure in support of or in opposition to a candidate
6 or before making an expenditure in support of or in opposition to a ballot proposition
7 or question **or to an initiative proposal application filed with the lieutenant**
8 **governor under AS 15.45.020**, each person other than an individual shall register, on
9 forms provided by the commission, with the commission.

10 * **Sec. 3.** AS 15.13.050 is amended by adding a new subsection to read:

11 (c) If a group intends to make more than 50 percent of its contributions or
12 expenditures in support of or in opposition to a single initiative on the ballot, the title
13 or common name of the initiative must be a part of the name of the group. If the group
14 intends to make more than 50 percent of its contributions or expenditures in opposition
15 to a single initiative on the ballot, the group's name must clearly state that the group
16 opposes that initiative by using a word such as "opposes," "opposing," "in opposition
17 to," or "against" in the group's name.

18 * **Sec. 4.** AS 15.13.065(c) is amended to read:

19 (c) Except for reports required by AS 15.13.040 and 15.13.110 and except for
20 the requirements of AS 15.13.050, 15.13.060, and 15.13.112 - 15.13.114, the
21 provisions of AS 15.13.010 - 15.13.116 do not apply to limit the authority of a person
22 to make contributions to influence the outcome of a ballot proposition. In this
23 subsection, in addition to its meaning in AS 15.60.010, "proposition" includes

24 **(1)** an issue placed on a ballot to determine whether

25 **(A)** [(1)] a constitutional convention shall be called;

26 **(B)** [(2)] a debt shall be contracted;

27 **(C)** [(3)] an advisory question shall be approved or rejected; or

28 **(D)** [(4)] a municipality shall be incorporated;

29 **(2)** **an initiative proposal application filed with the lieutenant**
30 **governor under AS 15.45.020.**

31 * **Sec. 5.** AS 15.13.110(e) is amended to read:

1 (e) A group formed to sponsor [AN INITIATIVE,] a referendum or a recall
2 shall report 30 days after its first filing with the lieutenant governor. Thereafter, each
3 group shall report within 10 days after the end of each calendar quarter on the
4 contributions received and expenditures made during the preceding calendar quarter
5 until reports are due under (a) of this section.

6 * Sec. 6. AS 15.13.110 is amended by adding a new subsection to read:

7 (g) An initiative committee, person, group, or nongroup entity receiving
8 contributions exceeding \$500 or making expenditures exceeding \$500 in a calendar
9 year in support of or in opposition to an initiative on the ballot in a statewide election
10 or an initiative proposal application filed with the lieutenant governor under
11 AS 15.45.020 shall file a report within 10 days after the end of each calendar quarter
12 on the contributions received and expenditures made during the preceding calendar
13 quarter until reports are due under (a) and (b) of this section. If the report is a first
14 report, it must cover the period beginning on the day an initiative proposal application
15 is filed under AS 15.45.020 and ending three days before the due date of the report.

16 * Sec. 7. AS 15.13.400(4) is amended to read:

17 (4) "contribution"

18 (A) means a purchase, payment, promise or obligation to pay,
19 loan or loan guarantee, deposit or gift of money, goods, or services for which
20 charge is ordinarily made, **and includes the payment by a person other than**
21 **a candidate or political party, or compensation for the personal services of**
22 **another person, that is rendered to the candidate or political party,** and
23 that is made for the purpose of

24 (i) influencing the nomination or election of a
25 candidate;

26 (ii) [, AND IN AS 15.13.010(b) FOR THE PURPOSE
27 OF] influencing a ballot proposition or question; **or**

28 (iii) **supporting or opposing an initiative proposal**
29 **application filed with the lieutenant governor under AS 15.45.020 [,**
30 **INCLUDING THE PAYMENT BY A PERSON OTHER THAN A**
31 **CANDIDATE OR POLITICAL PARTY, OR COMPENSATION FOR**

1 THE PERSONAL SERVICES OF ANOTHER PERSON, THAT ARE
2 RENDERED TO THE CANDIDATE OR POLITICAL PARTY];

3 (B) does not include

4 (i) services provided without compensation by
5 individuals volunteering a portion or all of their time on behalf of a
6 political party, candidate, or ballot proposition or question;

7 (ii) ordinary hospitality in a home;

8 (iii) two or fewer mass mailings before each election by
9 each political party describing the party's slate of candidates for
10 election, which may include photographs, biographies, and information
11 about the party's candidates;

12 (iv) the results of a poll limited to issues and not
13 mentioning any candidate, unless the poll was requested by or designed
14 primarily to benefit the candidate;

15 (v) any communication in the form of a newsletter from
16 a legislator to the legislator's constituents, except a communication
17 expressly advocating the election or defeat of a candidate or a
18 newsletter or material in a newsletter that is clearly only for the private
19 benefit of a legislator or a legislative employee; or

20 (vi) a fundraising list provided without compensation
21 by one candidate or political party to a candidate or political party;

22 * Sec. 8. AS 15.13.400(6) is amended to read:

23 (6) "expenditure"

24 (A) means a purchase or a transfer of money or anything of
25 value, or promise or agreement to purchase or transfer money or anything of
26 value, incurred or made for the purpose of

27 (i) influencing the nomination or election of a candidate
28 or of any individual who files for nomination at a later date and
29 becomes a candidate;

30 (ii) use by a political party;

31 (iii) the payment by a person other than a candidate or

1 political party of compensation for the personal services of another
2 person that are rendered to a candidate or political party; [OR]

3 (iv) influencing the outcome of a ballot proposition or
4 question; or

5 (v) supporting or opposing an initiative proposal
6 application filed with the lieutenant governor under AS 15.45.020;

7 (B) does not include a candidate's filing fee or the cost of
8 preparing reports and statements required by this chapter;

9 (C) includes an express communication and an electioneering
10 communication, but does not include an issues communication;

11 * Sec. 9. AS 15.13.400(8) is amended to read:

12 (8) "group" means

13 (A) every state and regional executive committee of a political
14 party; [AND]

15 (B) any combination of two or more individuals acting jointly
16 who organize for the principal purpose of influencing the outcome of one or
17 more elections and who take action the major purpose of which is to influence
18 the outcome of an election; a group that makes expenditures or receives
19 contributions with the authorization or consent, express or implied, or under
20 the control, direct or indirect, of a candidate shall be considered to be
21 controlled by that candidate; a group whose major purpose is to further the
22 nomination, election, or candidacy of only one individual, or intends to expend
23 more than 50 percent of its money on a single candidate, shall be considered to
24 be controlled by that candidate and its actions done with the candidate's
25 knowledge and consent unless, within 10 days from the date the candidate
26 learns of the existence of the group the candidate files with the commission, on
27 a form provided by the commission, an affidavit that the group is operating
28 without the candidate's control; a group organized for more than one year
29 preceding an election and endorsing candidates for more than one office or
30 more than one political party is presumed not to be controlled by a candidate;
31 however, a group that contributes more than 50 percent of its money to or on

1 behalf of one candidate shall be considered to support only one candidate for
2 purposes of AS 15.13.070, whether or not control of the group has been
3 disclaimed by the candidate; and

4 (C) any combination of two or more individuals acting
5 jointly who organize for the principal purpose of filing an initiative
6 proposal application under AS 15.45.020 or who file an initiative proposal
7 application under AS 15.45.020;

8 * **Sec. 10.** AS 15.45.080 is amended to read:

9 **Sec. 15.45.080. Bases of denial of certification.** The lieutenant governor shall
10 deny certification upon determining in writing that

11 (1) the proposed bill to be initiated is not confined to one subject or
12 is otherwise not in the required form;

13 (2) the application is not substantially in the required form; or

14 (3) there is an insufficient number of qualified sponsors.

15 * **Sec. 11.** AS 15.45.090(a) is amended to read:

16 (a) If the application is certified, the lieutenant governor shall prepare a
17 sufficient number of sequentially numbered petitions to allow full circulation
18 throughout the state. Each petition must contain

19 (1) a copy of the proposed bill [IF THE NUMBER OF WORDS
20 INCLUDED IN BOTH THE FORMAL AND SUBSTANTIVE PROVISIONS OF
21 THE BILL IS 500 OR LESS];

22 (2) an impartial summary of the subject matter of the bill;

23 (3) a statement of minimum costs to the state associated with
24 certification of the initiative application and review of the initiative petition, excluding
25 legal costs to the state and the costs to the state of any challenge to the validity of the
26 petition;

27 (4) an estimate of the cost to the state of implementing the proposed
28 law;

29 (5) the statement of warning prescribed in AS 15.45.100;

30 (6) sufficient space for the printed name, a numerical identifier, the
31 signature, the date of signature, and the address of each person signing the petition;

1 and

2 (7) other specifications prescribed by the lieutenant governor to ensure
3 proper handling and control.

4 * **Sec. 12.** AS 15.45 is amended by adding a new section to read:

5 **Sec. 15.45.195. Public hearings.** (a) At least 30 days before the election at
6 which an initiative is to appear on the ballot, the lieutenant governor or a designee of
7 the lieutenant governor shall hold two or more public hearings concerning the
8 initiative in each judicial district of the state. Each public hearing under this section
9 shall include the written or oral testimony of one supporter and one opponent of the
10 initiative.

11 (b) The lieutenant governor shall provide reasonable notice of each public
12 hearing required under this section. The notice must include the date, time, and place
13 of the hearing. The notice may be given using print or broadcast media. The lieutenant
14 governor shall provide notice in a consistent fashion for all hearings required under
15 this section.

16 (c) Penalties for a violation of this section may not include removal of an
17 initiative from the ballot.

18 (d) If the lieutenant governor determines that it is technologically and
19 economically feasible, the division shall provide a live audio and video broadcast of
20 each hearing held under (a) of this section on the division's Internet website.

21 * **Sec. 13.** AS 15.58.010 is amended to read:

22 **Sec. 15.58.010. Election pamphlet.** Before each state general election, and
23 before each state primary or special election at which a ballot proposition is scheduled
24 to appear on the ballot, the lieutenant governor shall prepare, publish, and mail at least
25 one election pamphlet to each household identified from the official registration list.
26 The pamphlet shall be prepared on a regional basis as determined by the lieutenant
27 governor.

28 * **Sec. 14.** AS 15.58.020(b) is amended to read:

29 (b) Each primary or special election pamphlet shall contain only the
30 information specified in (a)(6) and (a)(9) of this section for each ballot measure
31 scheduled to appear on the primary or special election ballot.

1 * **Sec. 15.** AS 24.05 is amended by adding a new section to article 4 to read:

2 **Sec. 24.05.186. Legislative hearings on initiatives certified by the**
3 **lieutenant governor.** (a) A standing committee of the legislature, selected jointly by
4 the presiding officers of the house of representatives and senate, shall hold at least one
5 hearing on an initiative that the lieutenant governor has determined was properly filed
6 under AS 15.45.160.

7 (b) The standing committee selected jointly by the presiding officers of the
8 house of representatives and senate under (a) of this section shall hold at least one
9 hearing under this section within 30 days after the convening of the legislative session
10 preceding the statewide election at which the initiative proposition must appear on the
11 election ballot under AS 15.45.190.

12 * **Sec. 16.** The uncodified law of the State of Alaska is amended by adding a new section to
13 read:

14 **APPLICABILITY.** This Act applies only to an initiative the application for which is
15 filed with the lieutenant governor under AS 15.45.020 on or after the effective date of this
16 Act.

From: mnardin@brenalaw.com
To: ANC_civil@akcourts.us
Cc: matt.singer@hklaw.com, lee.baxter@hklaw.com, margaret.paton-walsh@alaska.gov,
Subject: 3AN-20-05901 CI: Fair Share's Reply in Support of its Motion to Dismiss
Date: 6/9/2020 5:13:33 PM

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Attorneys for Defendant Vote Yes for
Alaska's Fair Share

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

RESOURCE DEVELOPMENT COUNCIL)
FOR ALASKA, INC.; ALASKA TRUCKING)
ASSOCIATION, INC.; ALASKA MINERS)
ASSOCIATION, INC.; ASSOCIATED)
GENERAL CONTRACTORS OF ALASKA;)
ALASKA CHAMBER; ALASKA SUPPORT)
INDUSTRY ALLIANCE,)

Plaintiffs,

v.

KEVIN MEYER, in his official capacity)
as Lt. Governor of the State of Alaska;)
GAIL FENUMIAI, in her capacity as Director)
of the Alaska Division of Elections; the)
STATE OF ALASKA, DIVISION OF)
ELECTIONS; and VOTE YES FOR)

ALASKA'S FAIR SHARE,

Defendants.

FILED in the TRIAL COURTS
STATE OF ALASKA, THIRD DISTRICT

JUN 09 2020

Clerk of the Trial Courts

By _____ Deputy

Case No. 3AN-20-05901CI

5
**FAIR SHARE'S REPLY
IN SUPPORT OF ITS
MOTION TO DISMISS**

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AS 15.45.110(c) is plain on its face: petition circulators may not be paid more than
\$1 per signature. As the circulators in this case are not alleged to have received per-signature

FAIR SHARE'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS
RDC v. Meyer, No. 3AN-20-05901 CI

June 9, 2020
Page 1 of 12

EXC 175

000187

payment, and the statute makes no mention of payment by salary, Plaintiffs have failed to state a claim under the unambiguous text of the statute.

If the Court looks beyond the plain text of the statute, the legislative history indicates the sponsor of the bill intended to ban per-signature payment without affecting other forms of compensation, but due to constitutional concerns, this outright ban was narrowed via amendment to a \$1-per-signature limit. Plaintiffs read the removal of a subsection that limited the original ban to per-signature payment as extending the \$1-per-signature limit to all forms of compensation, but the record shows no stated intention or policy rationale for doing so. On the contrary, extending the limit to all forms of compensation forces all petition circulators into the very per-signature compensation that the legislators intended to mitigate. The purpose of the statute—to mitigate the financial incentive for petition circulators to engage in misconduct, which itself may not survive strict constitutional scrutiny if tested¹—is counter to the interpretation that Plaintiffs ask this Court to adopt.

¹ *Meyer v. Grant*, 486 U.S. 414, 424, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988) (“The Attorney General has argued that the petition circulator has the duty to verify the authenticity of signatures on the petition and that compensation might provide the circulator with a temptation to disregard that duty. No evidence has been offered to support that speculation, however, and we are not prepared to assume that a professional circulator—whose qualifications for similar future assignments may well depend on a reputation for competence and integrity—is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot.”).

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If the Court looks beyond the plain text and clear purpose of the statute, the doctrine of constitutional avoidance demands an interpretation that saves the statute.² Protection of political speech is “at its zenith” for petition circulators because their activities are considered “core political speech” with “interactive communication concerning political change.”³ Plaintiffs’ interpretation of AS 15.45.110(c) cannot withstand constitutional scrutiny under controlling precedent, because it is not narrowly construed and undermines the only arguably acceptable State interest involved in this case. This Court should therefore reject Plaintiffs’ interpretation of the statute, and without it they cannot state their claim.

Plaintiffs fail to understand the unconstitutionality of their statutory interpretation, fail to distinguish cases that pre-date the current constitutional precedent and/or involve fraudulent conduct not present here,⁴ fail to address whatsoever the policy basis of the statute they purport to enforce, and fail once again to address the relevant reasoning of the Alaska Supreme Court.

² *State v. Planned Parenthood of the Great Northwest*, 436 P.3d 984, 1007 (Alaska 2019) (“[t]he doctrine of constitutional avoidance ‘is a tool for choosing between competing plausible interpretations of a statutory text’ “ such that, if the statute would be unconstitutional under one and valid under the other, “[our] plain duty is to adopt that which will save the Act”) (quoting *Estate of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 388 (Alaska 2013)); see also *Virginia v. American Booksellers Ass’n, Inc.*, 108 S.Ct. 636, 645, 484 U.S. 383, 397 (1988) (“It has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be ‘readily susceptible’ to a narrowing construction that would make it constitutional, it will be upheld” (citations omitted)).

³ *Nader v. Brewer*, 531 F.3d 1028, 1035 (9th Cir. 2008); *Meyer v. Grant*, 486 U.S. 414, 421-22, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988).

⁴ Vote Yes for Alaska’s Fair Share (“Fair Share”) will respond to Plaintiffs’ other statutory and caselaw arguments on pp. 20-33 of their combined filing in a separate opposition to their cross-motion for summary judgment.

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Plaintiffs continue to portray the wholesale invalidation of 39,149 certified Alaskan signatures as a routine procedural affair, when in fact they are advancing a claim that has never been granted in Alaska and directly contravenes the Alaska Supreme Court's established directive that the initiative process "should be liberally construed" so as to "preserve [initiatives] whenever possible"⁵ and "avoid[] the wholesale dis[en]franchisement of qualified electors."⁶ For the reasons advanced by the State and Fair Share, this Court should uphold the Fair Share Act and the constitutional right of Alaskans to vote on it.

A. Plaintiffs' restriction of all circulator compensation to \$1 per signature is plainly unconstitutional.

In a span of less than three pages, Plaintiffs blithely attempt to embrace cases upholding bans on per-signature compensation as supporting their ban on all compensation except per signature.⁷ As Fair Share already discussed in its Motion, and Plaintiffs do not dispute, courts in *Prete* and *Jaeger* permitted restricting per-signature compensation because those restrictions did not affect other methods of compensation.⁸ Again, Plaintiffs do not allege that Fair Share's circulators were paid by the signature, but rather that their compensation divided by the number

⁵ *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173, 1181 (Alaska 1985) (quoting *Boucher v. Engstrom*, 528 P.2d 456,462 (Alaska 1974)).

⁶ *North West Cruiseship Ass 'n of Alaska, Inc. v. State*, 145 P.3d 573, 578 (Alaska 2006) (quoting *Fischer v. Stout*, 741 P.2d 217, 255 (Alaska 1987)).

⁷ Plaintiffs' Opposition and Cross-Motion at 11-13 (June 2, 2020).

⁸ *Prete v. Bradbury*, 438 F.3d 949, 963 (9th Cir. 2006) (explaining that less-than-strict scrutiny was only possible because the scope of the Oregon ban was limited to per-signature petition payments only); *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 618 (8th Cir. 2001) (noting that state's interest in preventing signature fraud was supported with evidence that paying petition circulators per signature encouraged such fraud).

of signatures actually gathered exceeds \$1. Plaintiffs' effort to expand this criminal statute to all compensation of petition circulators, thereby effectively banning all compensation except \$1 per signature, is more akin to the complete ban on compensation that the *Meyer* court held to a "well-nigh insurmountable burden."⁹ Plaintiffs have utterly failed to meet *any* burden, because they cannot refute—and do not even bother mentioning—the fatal fact that their interpretation would *force* all Alaska petition circulators into per-signature compensation. Nor do Plaintiffs respond to the effect of *Citizens United* and the recent *Thompson* case overturning Alaska contribution limits,¹⁰ which underscore the unconstitutionality of the restriction they seek to impose on political speech. All of these authorities weigh against Plaintiffs.

B. The legislative history of AS 15.45.110(c) does not support Plaintiffs' restriction on all circulator compensation to \$1 per signature.

Because the text of the statute is plain on its face, the Court need not look beyond it in rejecting Plaintiffs' extreme expansion of the per-signature payment restriction. But if the Court chooses to do so, the purpose of the statute is also plain. Senator Sharp sponsored AS 15.45.110(c) to prohibit payment per signature for the express purpose of countering "signature bounty hunters" while acknowledging the constitutional limitations on banning payment for circulators and not restricting other methods of compensation.¹¹ In the House, Representative Davies emphasized the policy concern with "bounty hunter" circulators with a

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⁹ *Meyer*, 486 U.S. at 425.

¹⁰ Fair Share's Motion at 15.

¹¹ Exhibit 1 attached to Fair Share's Motion at Tr. 20:16 – 21:11.

direct incentive to gather as many signatures as possible: "In other words, if they're trying to get-they're going to get paid by the piece and by each signature, they're going to be much more aggressive about going after every individual person out there than otherwise."¹² Representatives Grussendorf and Mulder expressed indefinite (and audibly indiscernible) concerns about how hourly compensation might interact with Representative Mulder's amendment to narrow Senator Sharp's ban to a \$1-per-signature limit:

REPRESENTATIVE GRUSSENDORF: Yeah. Thank you, Mr. Chairman. We have a suggestion as to the hourly rate, but I am concerned if you pay an hourly rate, then the person who is sponsoring or bankrolling a payroll as such (indiscernible) reductions and everything (indiscernible) workman's comp to other problems that come in there, or maybe even a (indiscernible) system that within an hour we expect you have X amount of petitions-or signatures. I don't know if we can get by-you know, around that that way.

CHAIRMAN THERRIAULT: Representative Mulder.

REPRESENTATIVE MULDER: Thank you, Mr. Chairman. I-you're exactly right, Representative Grussendorf. If you do a whole-putting out the whole new realm of requirements in terms of being a (indiscernible)-or being an employer.¹³

Chairman Therriault described Representative Mulder's amendment as allowing "pay per signature up to \$1 per signature, but it would cap it at that amount" in response to the constitutional concerns with the outright ban.¹⁴ Representative Mulder continued:

So I think it's a modest amount, Mr. Chairman. It still does not put such an onus on that makes it totally unworkable to have a payment, but it does also-by having such a low payment, it does stretch out the time requirement that's going to be expected in order to get the initiative. If you pay \$2 a signature or \$2.50 a

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¹² Exhibit 2 attached to Fair Share's Motion at Tr. 76:15-77:5.

¹³ Exhibit 2 attached to Fair Share's Motion at Tr. 77:9-77:24.

¹⁴ Exhibit 2 attached to Fair Share's Motion at Tr. 75:22-76:4.

signature, you can collect signatures pretty doggone fast. A block of signatures slows out that process quite a bit longer. So I think it's a modest amount.

CHAIRMAN THERRIAULT: Representative Davies.

REPRESENTATIVE DAVIES: I don't understand what the state interest is in slowing down getting signatures. But let me just say one other thing about the--the amendment would limit the amount of money that you could pay, and the existing language only limits the way in which you make payment. It doesn't limit the amount. You could pay the guy 100 bucks an hour if you want. There's no limit to how much you're paying. And because that difference--I think that the existing language is much less subject to the constitutional challenge than the amendment. The amendment gets closer to a--in fact, is a limit. It's a hard limit in terms of how much you can pay. And as that--and I agree that it's different than the exact court case, but I think it's closer to the court case than the language that's in the bill, and for that reason is more likely to be overturned than the bill--than the language in the bill.¹⁵

Representative Davies' concerns went unanswered though he was in the minority in opposing the amendment that also removed the following sentence from Senator Sharp's bill: "This subsection does not prohibit a sponsor from being paid an amount that is not based on the number of signatures collected." Removing this qualifier on the original ban does not equate to adding a limit on all compensation, particularly when no one supporting the amendment expressed such intention to reverse the bill's scope entirely, or any policy rationale for doing so. Some legislators were less than clear in their discussion; but the sponsor's clear intent, the backdrop of constitutional concerns, and the only articulated policy basis of the limitation on per-signature compensation all weigh against interpreting AS 15.45.110(c) as banning *all* compensation for signature circulating *except* \$1 per signature and such

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¹⁵ Exhibit 3 attached hereto, House Finance Committee Tr. 78:6-79:7 (March 8, 1998).

interpretation would clearly be unconstitutional in light of the federal authorities discussed above.¹⁶ Plaintiffs' reference to a subsequent bill that did not ultimately affect AS 15.45.110(c)¹⁷ is irrelevant to the policy discussion underlying the enactment of the statute. This Court should interpret and apply AS 15.45.110(c) to avoid constitutional violation and achieve its core-policy purpose, not the exact opposite.

C. The remedy for violation of AS 15.45.110(c) is not the disenfranchisement of nearly 40,000 Alaskans whose signatures have been validated.

There has been no violation of AS 15.45.110(c), but, if there were, the express remedy is the criminal penalty provided under AS 15.45.110(d). In trying to expand the scope of the statute beyond its per-signature purpose, Plaintiffs expressly intend the stifling of political speech: "It is unlikely professionally paid circulators from Advanced Micro Targeting would have travelled to Alaska to gather subscriptions had Defendant Vote Yes ... compensated circulators \$1 or less for every signature gathered."¹⁸ They then cite to inapposite Montana and Maine cases that involve outright fraud,¹⁹ whereas here there are no allegations with regard to the veracity of either the signatures or the affidavits, except Plaintiffs' disagreement that the circulators were legally correct in swearing their compliance with AS 15.45.110(c). Plaintiffs

¹⁶ See n.2, *supra*.

¹⁷ Plaintiffs' Opposition and Cross-Motion at 16-17.

¹⁸ Plaintiffs' Opposition and Cross-Motion at 19.

¹⁹ *Montanans for Justice v. State ex rel. McGrath*, 146 P.3d 759, 770, 334 Mont. 237, 251, 2006 MT 277, ¶ 44 (Montana 2006) (circulators routinely attested to gathering signatures they had not gathered, used false addresses in their certification affidavits, and employed a deceitful "bait and switch" tactic); *Maine Taxpayers Action Network v. Secretary of State*, 795 A.2d 75, 80 (2002) (signature gatherer who signed the oath for verification of the signatures was an impostor).

continue to ignore such distinctions in their broad assertions regarding “the weight of American law” supporting invalidation of the initiative and persist in misapplying the Alaska authority that carries the most weight for this Court.

All parties agree that *North West Cruiseship* is a leading Alaska decision in this case, and the State and Fair Share agree that the decision stands for (1) the Alaska Supreme Court's commitment to liberally construe and protect Alaskans' constitutional rights to the initiative process, and (2) the Court's accordant position that “when the legal transgression did not affect the signer's knowledge or understanding of the matter at hand—i.e. the integrity of the signature as a sign of the voter's genuine, informed support for the initiative—wholesale invalidation of all of the signatures was an improper remedy.”²⁰ Plaintiffs concede that the Court's reason for allowing the exclusion of two petition pages in *North West Cruiseship* “was that the circulator's failure to follow the law may have led to the collection of these subscriptions.”²¹ There is no allegation that the purported violation of AS 15.45.110(c) had any effect on the integrity of Fair Share's subscriptions, so *North West Cruiseship* offers nothing to Plaintiffs but a rebuke of their efforts to invalidate those subscriptions. What they ask of this Court is precisely what the superior court and the Alaska Supreme Court rejected: “an interpretation that requires a broader remedy that disenfranchises voters who did nothing wrong.”²²

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²⁰ State's Reply at 4-5 (May 19, 2020).

²¹ Plaintiffs' Opposition and Cross-Motion at 19.

²² *North West Cruiseship*, 145 P.3d at 587.

Plaintiffs here have not claimed any violation of the substantive requirements of AS 15.45.130. They do not allege any of the affidavits in this case have any formal flaw like the two pages disqualified in *North West Cruiseship* in which the Court held that the requirements of AS 15.45.130 should be construed “only as broadly as is necessary to address the specific error.”²³ Instead, Plaintiffs ask this Court to read a new requirement into the statute and impose a new duty on the State. *North West Cruiseship* speaks to this issue as well:

We further note that the petition booklets were prepared with several safeguards, including (1) a warning that anyone who signs the petition knowing that he or she is not a qualified voter is guilty of a misdemeanor; (2) directions to the petition circulators that each subscriber must be a registered Alaskan voter; and (3) a certification affidavit from the petition circulator attesting, under penalty of perjury, that the signatures in each petition booklet were drawn from persons “who were qualified voters on the date of the signature.” The training materials provided to petition circulators also emphasized that the subscribers must be registered voters. Given these additional safeguards, we conclude that the 1,202 signatures were properly counted.²⁴

The same safeguards are present here, and the lieutenant governor had no additional duty or power to review the veracity of the affidavits required under AS 15.45.130. *North West Cruiseship* does not empower Plaintiffs to construe additional requirements and remedies in the statutes but rather stands in firm opposition to such efforts to stifle the constitutional right to initiative, no matter how much Plaintiffs label that right a “trope.”²⁵

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²³ *North West Cruiseship*, 145 P.3d at 587.

²⁴ *North West Cruiseship*, 145 P.3d at 576-77.

²⁵ Opposition and Cross-Motion at 4.

CONCLUSION

Assuming the Plaintiffs' factual allegations are true,²⁶ their case fails as a matter of law on multiple levels. Plaintiffs' case fails as a matter of law because the petition circulators properly certified the petitions under AS 15.45.130. Plaintiffs' interpretation of AS 15.45.130 is contradicted by *North West Cruiseship* and virtually every other statute in AS 15.45 governing the initiative process. When the "per-signature" payment limitation is properly interpreted and applied, Plaintiffs' case fails as a matter of law because the petition circulators did not enter into an agreement in violation of AS 15.45.110(c), because the State should be given a constitutional interpretation as restricting only per-signature compensation or else be thrown out as an unconstitutional impairment of political speech.

Even assuming this Court does not accept any of Fair Share's positions on the underlying statutes, Plaintiffs' case still fails as a matter of law because the remedy of disenfranchising 39,149 Alaskan voters is simply not available under the facts of this case. Plaintiffs have not alleged a single improper signature among the 39,149 the lieutenant governor verified as correct. There is no basis for blocking the Fair Share Act from the ballot. Fair Share respectfully urges this Court to roundly reject Plaintiffs' efforts to use the court system as another piece of their campaign against the Fair Share Act and uphold the right of Alaskans to vote on this critical issue as intended by the founders of our State.

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²⁶ Fair Share addressed the overturned and unenforced (but still on the books) residency requirement because Plaintiffs made mention of it in their Complaint, but they have now explicitly disclaimed that issue. Opposition and Cross-Motion at 2.

RESPECTFULLY SUBMITTED this 9th day of June, 2020.

BRENA, BELL & WALKER, P.C.
Counsel for Defendant Vote Yes for Alaska's
Fair Share

By //s// Robin O. Brena
Robin O. Brena, Alaska Bar No. 8410089
Jon S. Wakeland, Alaska Bar No. 0911066

Certificate of Service

I hereby certify that a true and correct
copy of the foregoing document
was served by e-mail upon
the following this 9th day of June 2020.

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FAIR SHARE'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS
RDC v. Meyer, No. 3AN-20-05901 CI

June 9, 2020
Page 12 of 12

In the Matter Of:
SENATE JUDICIARY COMMITTEE

SENATE JUDICIARY COMMITTEE MEETING
March 18, 1998

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**CERTIFIED
TRANSCRIPT**

SENATE JUDICIARY COMMITTEE

MARCH 18, 1998

1:35 P.M.

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SENATE JUDICIARY COMMITTEE
SENATE JUDICIARY COMMITTEE MEETING on 03/18/1998

<p>Page 18</p> <p>1 properly, to tender the defense of his -- of the claim that's 2 been filed against him over to, say, the City of Anchorage, 3 and say, here, I did what I was supposed to do, I followed 4 your rules, everything was okay, I'm now personally being 5 sued, defend me, and, by the way, pay the judgment and so my 6 family will not suffer because I did what you have asked or 7 told me to do. 8 I think what we're really talking about is, how does 9 that flow through. And who bears ultimate responsibility for 10 the act, of course, is the actor. But is there in fact a 11 chain that can be moved up to get to the deeper pocket than 12 what maybe just the police officer himself or the FBI agent 13 may have. 14 SENATOR WARD: Maybe, Mr. Chairman, if I can, the 15 officers that approached me to introduce this -- and, you 16 know, they're part of that CERT team that approached me to do 17 this, they're under the impression that the last phase of 18 liability still absolutely remains to them, and really it 19 wasn't so much the shooting the bean bags. They also are 20 called upon to kill people. And they know full well that 21 that's their decision and they're held responsible for it, 22 regardless of the orders that are coming down. 23 But that's why not everybody can just go into this 24 field. They have ongoing psychological tests as well as 25 reoccurring certification. It's -- not that many people</p> <p>Page 19</p> <p>1 would want to do it, you know, let alone do do it. But 2 they're under the impression that they still have the 3 absolute final decision whether or not to shoot, and so 4 regardless of -- and it's a situation and then they have to 5 defend that situation, which they do. They spend a fair 6 amount of time in courts too. That's just a part of what 7 goes on. 8 CHAIRMAN TAYLOR: Yes, Senator Parnell. 9 SENATOR PARNELL: Is there any more public testimony 10 on the bill? 11 CHAIRMAN TAYLOR: I don't know. Is anyone here in 12 the room wishing to testify? (Indiscernible) anyone 13 (indiscernible). 14 SENATOR PARNELL: Thank you, Mr. Chairman. 15 CHAIRMAN TAYLOR: We do not -- we do not have 16 teleconference set up, I don't believe, on this one. 17 SENATOR WARD: We had just the city police and state 18 affairs -- 19 CHAIRMAN TAYLOR: This is the only -- 20 SENATOR WARD: They were the only ones that -- 21 CHAIRMAN TAYLOR: Okay. 22 SENATOR PARNELL: Want me to move that? 23 UNIDENTIFIED SPEAKER: Yes. Sure. 24 SENATOR PARNELL: Mr. Chairman, I would move SB 309 25 from committee with individual recommendations.</p>	<p>Page 20</p> <p>1 CHAIRMAN TAYLOR: Is there any objections? There 2 being no objection, moves from committee with individual 3 recommendations. 4 Thank you very much, Senator Ward. 5 CHAIRMAN TAYLOR: Senator Sharp. I love your tie. 6 SENATOR SHARP: Got it from my youngest conservative 7 son. Annual gift. 8 CHAIRMAN TAYLOR: Do you have any sons who aren't 9 conservative? 10 SENATOR SHARP: Good afternoon, Mr. Chairman. I 11 appreciate the opportunity to address this legislation. 12 Primarily SB 313 addresses the initiative process and some 13 areas that -- at least one area that the State of Alaska 14 hadn't -- has no rules against, and all other states do, and 15 I'll point that out. 16 It's often assumed that persons obtaining signatures 17 on a ballot initiative are volunteers who believe strongly in 18 a cause, and in many cases that is true. But unfortunately, 19 what is more often not the case. Instead, it is more likely 20 that the solicitors are signators -- signature bounty hunters 21 who are paid by the sponsor of the initiative. 22 In an effort to bring an issue process back to a 23 more grassroots effort, SB 313 requires visual identification 24 of name and voter registration identification number of the 25 petition circulators wearing it on their person at the time</p> <p>Page 21</p> <p>1 they're soliciting, whether they're in a mall or whether 2 knocking on doors. 3 And it also prohibits payment per signature by the 4 sponsor. Payment would still be allowed by the hour or any 5 other method. And the reason for that, Mr. Chairman, is that 6 Leg Legal has said that, in the Lower 48 where they 7 prohibited payments of any kind for obtaining signatures on 8 an initiative, it was declared unconstitutional restraint of 9 the process. But they do believe other states have at least 10 prohibited payments by the signature, and that has stood up 11 in court so far. So this proposed legislation would do that. 12 And also, the bill prohibits paying a person to sign 13 a petition, which we do not currently prohibit. We can go 14 out and buy signatures for whatever the market will bear, if 15 you've got enough money to buy them. 16 In addition, existing law grants a 30-day extension 17 to a sponsor if they are unsuccessful in obtaining the 18 required number of verified signatures within the allowed 19 time frame. So SB 313 will eliminate this 30-day extension 20 after verification if more signatures are -- if they fall 21 short of the signatures. This way, if the required number of 22 signatures are not successfully obtained, the initiative 23 simply does not appear on the ballot. 24 Simply put, Mr. Chairman, you either got them or you 25 don't. And it doesn't open the door for the period of time</p>
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In the Matter Of:
HOUSE FINANCE COMMITTEE

HOUSE FINANCE COMMITTEE MEETING

March 08, 1998

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HOUSE FINANCE COMMITTEE

MARCH 8, 1998

7:30 P.M.

PACIFIC RIM REPORTING
907-272-4383

HOUSE FINANCE COMMITTEE
HOUSE FINANCE COMMITTEE MEETING on 03/08/1998

Page 74

1 0-LS0151/D, which, of course, is House committee substitute
2 for CS -- for Senate Bill Number 11, Finance, for the
3 accompanying fiscal notes and with individual
4 recommendations.
5 CHAIRMAN THERRIAULT: Is there objection to the
6 motion? Seeing none, the bill will be moved from
7 committee.
8 We will hold that until we get the fiscal note from
9 the department so that moves along with it.
10 Next I would like to take up Senate Bill 313. That
11 will be the only other bill that we take up this evening.
12 REPRESENTATIVE MARTIN: Mr. Chairman, how about
13 House Bill 367 (indiscernible).
14 CHAIRMAN THERRIAULT: No. We don't have that one on
15 the list.
16 REPRESENTATIVE MARTIN: We don't have that?
17 CHAIRMAN THERRIAULT: We actually -- maybe we will
18 get to that one and maybe a little bit of discussion on
19 Senate Bill 297 if there's anybody in the building yet to
20 speak on that one.
21 Marilyn, just give me a minute here.
22 UNIDENTIFIED SPEAKER: Mr. Chairman, what is the
23 bill number?
24 CHAIRMAN THERRIAULT: 313. Senate Bill 313.
25 REPRESENTATIVE MARTIN: Initiative processes.

Page 75

1 CHAIRMAN THERRIAULT: Procedures for initiatives.
2 And I believe when we left off there was a number of
3 questions regarding court cases. There is a memo from Rick
4 Glover in your file, plus, in addition, I spoke to AG today,
5 attorney with the Department of Law. There are two Meyer
6 (ph) cases. One of them has been to the Supreme Court which
7 clearly stated that you cannot prohibit the payment for the
8 gathering of signatures. It didn't specify whether you could
9 limit the amount that you get paid for gathering signatures.
10 So if we adopt language doing so, we're in a bit of a gray
11 area.
12 Also, there's a current court case dealing with the
13 person having to wear the ID badge that -- that was found to
14 be unconstitutional by the Tenth Circuit Court of Appeals.
15 It has been appealed to the Supreme Court and they have
16 decided to take that up. The State of Alaska has signed on
17 to an amicus brief to the Supreme Court in support of the
18 constitutionality of those provisions. So if we were to put
19 that language into our statutes, it would not be
20 contradictory to the position that the state has currently
21 taken before the U.S. Supreme Court.
22 I think where we left off, Representative Mulder had
23 offered his amendment -- it was Amendment Number 1 -- which
24 dealt with putting language into the bill that would allow
25 you to pay per signature up to \$1 per signature, but it would

Page 76

1 cap it at that amount. So I wanted to make it clear to
2 individuals that that cap on the payment has not been found
3 to be unconstitutional. An outright ban of any payment has
4 been found to be unconstitutional.
5 So with that, Representative Mulder, I believe you
6 had moved your amendment.
7 REPRESENTATIVE MULDER: I believe I had,
8 Mr. Chairman. Just -- but just to make certain, I'll once
9 again move Amendment Number 1.
10 CHAIRMAN THERRIAULT: Is there objection to
11 Amendment Number 1?
12 UNIDENTIFIED SPEAKER: Yes. I object.
13 CHAIRMAN THERRIAULT: There is objection.
14 Representative Davies.
15 REPRESENTATIVE DAVIES: Mr. Chair, following the
16 discussion that we had the last time we looked at this bill,
17 one of the considerations was that -- one of the concerns, I
18 think, that gives rise to this bill was the fact of people
19 carrying this petitions being aggressive and kind of in your
20 face and overly aggressive.
21 And Mr. Chair, I believe that the existing language
22 in here that's proposed in the bill that would limit the
23 payment to an hourly rate or a salary or a flat fee or
24 something like that, a daily fee or some approach, anything
25 other than a per-signature approach, would move in the

Page 77

1 direction of a person being less aggressive, less in your
2 face. In other words, if they're trying to get -- they're
3 going to get paid by the piece and by each signature, they're
4 going to be much more aggressive about going after every
5 individual person out there than otherwise.
6 So actually, while I appreciate the kind of
7 direction that the amendment is going, I -- in retrospect, I
8 think that the existing language in the bill is preferable.
9 CHAIRMAN THERRIAULT: Representative Grussendorf.
10 REPRESENTATIVE GRUSSENDORF: Yeah. Thank you,
11 Mr. Chairman. We have a suggestion as to the hourly rate,
12 but I am concerned if you pay an hourly rate, then the person
13 who is sponsoring or bankrolling a payroll as such
14 (indiscernible) reductions and everything (indiscernible)
15 workman's comp to other problems that come in there, or maybe
16 even a (indiscernible) system that within an hour we expect
17 you have X amount of petitions -- or signatures. I don't
18 know if we can get by -- you know, around that that way.
19 CHAIRMAN THERRIAULT: Representative Mulder.
20 REPRESENTATIVE MULDER: Thank you, Mr. Chairman.
21 I -- you're exactly right, Representative Grussendorf. If
22 you do a whole -- putting out the whole new realm of
23 requirements in terms of being a (indiscernible) -- or being
24 an employer. I guess I've never really experienced a problem
25 that much of having very aggressive signatory collectors. I

In the Matter Of:
HOUSE FINANCE COMMITTEE

HOUSE FINANCE COMMITTEE MEETING

March 08, 1998

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**CERTIFIED
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HOUSE FINANCE COMMITTEE

MARCH 8, 1998

7:30 P.M.

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HOUSE FINANCE COMMITTEE
HOUSE FINANCE COMMITTEE MEETING on 03/08/1998

<p style="text-align: right;">Page 78</p> <p>1 think that there probably are some out there, and they're 2 certainly annoying if they would get into your face, but the 3 worse that happens is you just say, no, thanks. I mean, 4 they've approached me many times and I generally don't sign 5 and just walk away. I've never been bothered. 6 So I think it's a modest amount, Mr. Chairman. It 7 still does not put such an onus on that makes it totally 8 unworkable to have a payment, but it does also -- by having 9 such a low payment, it does stretch out the time requirement 10 that's going to be expected in order to get the initiative. 11 If you pay \$2 a signature or \$2.50 a signature, you can 12 collect signatures pretty doggone fast. A block of 13 signatures slows out that process quite a bit longer. So I 14 think it's a modest amount. 15 CHAIRMAN THERRIAULT: Representative Davies. 16 REPRESENTATIVE DAVIES: I don't understand what the 17 state interest is in slowing down getting signatures. But 18 let me just say one other thing about the -- the amendment 19 would limit the amount of money that you could pay, and the 20 existing language only limits the way in which you make 21 payment. It doesn't limit the amount. You could pay the guy 22 100 bucks an hour if you want. There's no limit to how much 23 you're paying. 24 And because that difference -- I think that the 25 existing language is much less subject to the constitutional</p>	<p style="text-align: right;">Page 79</p> <p>1 challenge than the amendment. The amendment gets closer to 2 a -- in fact, is a limit. It's a hard limit in terms of how 3 much you can pay. And as that -- and I agree that it's 4 different than the exact court case, but I think it's closer 5 to the court case than the language that's in the bill, and 6 for that reason is more likely to be overturned than the 7 bill -- than the language in the bill. 8 CHAIRMAN THERRIAULT: Further questions? Seeing 9 none, there is objection, so we will have a vote on Amendment 10 Number 1. 11 THE CLERK: Representative Kelly. 12 REPRESENTATIVE KELLY: Yes. 13 THE CLERK: Representative Kohring. 14 REPRESENTATIVE KOHRING: Yes. 15 THE CLERK: Representative Martin. 16 REPRESENTATIVE MARTIN: Pass. 17 THE CLERK: Representative Moses. 18 Representative MOSES: No. 19 THE CLERK: Representative Mulder. 20 REPRESENTATIVE MULDER: Yes. 21 THE CLERK: Representative Davies. 22 REPRESENTATIVE DAVIES: No. 23 THE CLERK: Representative Davis. 24 REPRESENTATIVE DAVIS: Yes. 25 THE CLERK: Representative Grussendorf.</p>	<p style="text-align: right;">Page 80</p> <p>1 REPRESENTATIVE GRUSSENDORF: No. 2 THE CLERK: Representative Therriault. 3 CHAIRMAN THERRIAULT: Yes. 4 THE CLERK: Representative Martin. 5 REPRESENTATIVE MARTIN: A weak yes. 6 THE CLERK: Six yea, four nay -- or three nay. 7 CHAIRMAN THERRIAULT: Okay. Representative Davies. 8 Amendment A, we will number that Number 2. 9 Representative Davies. 10 REPRESENTATIVE DAVIES: Mr. Chair, I would move 11 Number 2. 12 CHAIRMAN THERRIAULT: I will object for the purpose 13 of discussion. 14 REPRESENTATIVE DAVIES: Mr. Chair, Number 2, of 15 course, gets at -- on page 1, lines 9 through 10, the 16 requirement that the sponsor wear a badge identifying them 17 with their name (indiscernible) carrying a petition, and this 18 is exactly the subject of a case that's been decided at the 19 lower level, and as you indicate, is on appeal to a higher 20 level. But in that case the argument is the Supreme Court 21 has protected anonymous (indiscernible) expression and 22 association, and the Court protects that anonymity because of 23 fear of reprisal might deter perfectly peaceful discussions 24 of public matters of importance. 25 They also observe that the badge requirement</p>	<p style="text-align: right;">Page 81</p> <p>1 operates when the reaction to their message may be the most 2 intense emotion and unreasoned. Thus, as opposed to the 3 affidavit requirement, the badge requirement deprives 4 circulators of their anonymity at the precise moment their 5 interest in anonymity is the greatest. 6 So I'm just reading from the court decision here, 7 just a couple lines. The Supreme Court explained anonymity 8 is a shield from tyranny of the majority. It thus 9 exemplifies the protection of the minority that is given in 10 the constitution. 11 So the argument in that case was that this -- this 12 requirement to identify a person, it's also consistent -- 13 also is -- has the same protection and arises out of the same 14 reason why we have secret ballots. It allows people to vote 15 on an issue without being identified. So it's that whole 16 kind of area of law where you have constitutional protection 17 that we have that allows people political speech in a way 18 that facilitates that speech. 19 Now, I think that, having said that, I think there 20 is still some basis for identifying who paid for the 21 collection, if somebody is paying for the collection of these 22 signatures, or who the group is that's sponsoring the 23 petition. But I would think that the most appropriate way to 24 address that would be to have, on the head of the petition, 25 similar to the way we have in our yard signs and bumper</p>
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Attorneys for Defendant Vote Yes for
Alaska's Fair Share

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

RESOURCE DEVELOPMENT COUNCIL)
FOR ALASKA, INC.; ALASKA TRUCKING)
ASSOCIATION, INC.; ALASKA MINERS)
ASSOCIATION, INC.; ASSOCIATED)
GENERAL CONTRACTORS OF ALASKA;)
ALASKA CHAMBER; ALASKA SUPPORT)
INDUSTRY ALLIANCE,)

Plaintiffs,)

v.)

KEVIN MEYER, in his official capacity)
as Lt. Governor of the State of Alaska;)
GAIL FENUMIAI, in her capacity as Director)
of the Alaska Division of Elections; the)
STATE OF ALASKA, DIVISION OF)
ELECTIONS; and VOTE YES FOR)
ALASKA'S FAIR SHARE,)

Defendants.)

**FILED in the TRIAL COURTS
STATE OF ALASKA, THIRD DISTRICT**

JUN 17 2020

Clerk of the Trial Courts

By _____ Deputy

Case No. 3AN-20-05901CI

BRENA, BELL &
WALKER, P.C.
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**FAIR SHARE'S OPPOSITION TO
PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT**

FAIR SHARE'S OPPOSITION TO PLAINTIFFS' CROSS-MOTION
RDC v. Meyer, No. 3AN-20-05901 CI

June 17, 2020
Page 1 of 11

EXC 196

000171

Vote Yes for Alaska's Fair Share ("Fair Share"), by and through its counsel, Brena, Bell & Walker, P.C., hereby opposes the Plaintiffs' Cross-Motion for Partial Summary Judgment.¹ On June 12, 2020, the Alaska Supreme Court reaffirmed its commitment to liberally construing the initiative process to protect the constitutional rights of Alaskans:

We have explained on numerous occasions our deferential view toward the people's initiative right. *See, e.g., City of Fairbanks v. Fairbanks Convention & Visitors Bureau*, 818 P.2d 1153, 1155 (Alaska 1991) ("The usual rule applied by this court is to construe voter initiatives broadly so as to preserve them whenever possible."); *Thomas v. Bailey*, 595 P.2d 1, 3 (Alaska 1979) ("The right of initiative . . . should be liberally construed to permit exercise of that right."). When reviewing a challenge to an initiative prior to its submission to voters, we liberally construe the constitutional and statutory requirements pertaining to the use of initiatives so that "the people [are] permitted to vote and express their will on the proposed legislation." *Boucher v. Engstrom*, 528 P.2d 456, 462 (Alaska 1974) (alteration in original) (quoting *Cope v. Toronto*, 332 P.2d 977, 979 (Utah 1958)), *overruled in part on other grounds by McAlpine v. Univ. of Alaska*, 762 P.2d 81 (Alaska 1988). "To that end 'all doubts as to technical deficiencies or failure to comply with the exact letter of procedure will be resolved in favor of the accomplishment of that purpose.'" *Municipality of Anchorage v. Frohne*, 568 P.2d 3, 8 (Alaska 1977) (quoting *Boucher*, 528 P.2d at 462).²

The new decision centers on the one-subject requirement but again articulates the core constitutional principles that Plaintiffs in this case disregard in their effort to invalidate the verified signatures of 39,149 Alaskans. While they downplay and dismiss any notion of disenfranchisement, the leading Alaska case expressly stands against "an interpretation that requires a broader remedy that disenfranchises voters who did nothing wrong."³ Taking all of

¹ Fair Share has replied to the arguments on pages 1-20 of Plaintiffs' combined filing and focuses this opposition on the arguments for partial summary judgment on pages 20-33.

² *Meyer v. Alaskans for Better Elections*, Supreme Court No. S-17629, Opinion No. 7460 (June 12, 2020) at 7-8 n.19.

³ *North West Cruiseship Ass'n v. State*, 145 P.3d 573, 587 (Alaska 2006).

Plaintiffs' allegations as true, they have claimed no fault on the part of the tens of thousands of voters who signed the petitions for the Fair Share Act or raised any question as to the integrity of their signatures. Like the industry coalition in *North West Cruiseship*, Plaintiffs seek to invalidate the verified signatures of innocent voters to remove the Fair Share Act from the ballot directly impairing the constitutional right of Alaskans to participate in the initiative process. And like the industry coalition in *North West Cruiseship*, Plaintiffs' attempt should be roundly rejected.

I. THE REQUIREMENTS OF AS 15.45.130 HAVE BEEN SATISFIED

The lieutenant governor "may not count subscriptions on petitions not properly certified" under AS 15.45.130, but the statute expressly lists the requirements of the affidavit needed to deem the petition properly certified. Nowhere under the laws of Alaska is the lieutenant governor required to extend his ministerial duty into the investigation of adjudicatory proceedings involving the underlying factual and legal disputes among stakeholders to confirm each and every sworn statement made in the circulators' affidavits. Plaintiffs' suggestion that the lieutenant governor must conduct an inquiry concerning the compensation of petition circulators before fulfilling his duty to confirm there are verifications on the petition booklets is without any statutory antecedent or even a basic statutory structure to achieve such a result. The statutory structure is clear—the lieutenant governor's role is to confirm the petition booklets are verified, and if there is a violation of AS 15.45.110(d), it is a criminal matter having nothing whatsoever to do with the lieutenant governor's role to ensure a verification is present on the petition booklet.

Nowhere in the statutes is the falsity of such affidavits made a basis for excluding subscriptions on otherwise properly certified petitions. The State correctly states that the eight substantive requirements for affidavits under AS 15.45.130 contemplate an administrative facial review, particularly in light of the 60-day review timeframe.⁴ The statute provides that petitions must be “properly certified at the time of filing or corrected before the subscriptions are counted[,]” underscoring the statute’s focus on the form of the affidavits with no mention of investigating their constituent statements. The State also notes the absence of any statutory process for the lieutenant governor to look beyond the face of the affidavits as Plaintiffs demand,⁵ and further, that the circulators who swore to no violation of AS 15.45.110(c) did not do so falsely, unless they shared Plaintiffs’ interpretation of that statute.⁶ But this Court need not reach the *mens rea* of the circulators, as that goes to the provided criminal penalty under AS 15.45.110(e) and not to the *unprovided* remedy of wholesale invalidation that Plaintiffs seek to construe into the statute.

Plaintiffs here have not claimed any violation of the substantive requirements of AS 15.45.130. They do not allege that any of the affidavits in this case have any formal flaw like the two petition pages disqualified in *North West Cruiseship*. The formal requirements have been met, the petitions have been properly certified, and AS 15.45.130 has been fully satisfied. Plaintiffs instead ask this Court to read a new requirement into the statute and impose

⁴ State’s Reply at 6-9 (May 19, 2020).

⁵ State’s Reply at 8-9.

⁶ State’s Reply at 5-6.

a new duty on the lieutenant governor to look beyond the face of the certifying affidavits before the lieutenant governor can properly count signatures. *North West Cruiseship* stands firmly against construing the statutory requirements in opposition to the constitutional right to initiative. On the contrary, the Court in *North West Cruiseship* upheld the State's deviation from the letter of its own regulations holding that "counting signatures from the pages containing the proper 'paid by' information reflects the balance sought by the legislature between the people's right to legislate by initiative and the goal of ensuring that petition subscribers are well informed upon signing."⁷ Plaintiffs have made no allegation that the 39,149 subscribers of the Fair Share Act were not well informed. *North West Cruiseship* and the weight of Alaska authority, reinforced once more by *Meyer v. Alaskans for Better Elections*, demonstrate that what Plaintiffs seek cannot be granted.

II. PLAINTIFFS' CITES TO CASES OUTSIDE ALASKA DO NOT AVAIL THEIR CLAIM TO INVALIDATE THE VERIFIED PETITIONS IN THIS CASE

Plaintiffs ask the Court to consider a variety of decisions from other states that involve misconduct they have not alleged here. None of the Plaintiffs' cited cases has as a backdrop the clear constitutional authority present in Alaska of empowering initiatives by voters and avoiding disenfranchising these voters for the mistakes of others. All of the Plaintiffs' cited cases are inapposite and unpersuasive authorities, as they concern different circumstances from those present in this case in which there has been no question raised as to the validity of the 39,149 voter signatures Plaintiff asks this Court to invalidate.

⁷ *North West Cruiseship*, 145 P.3d at 578.

In *Brousseau v. Fitzgerald*,⁸ the Arizona Supreme Court overturned the trial court's finding that verified signatures, contained on petitions improperly circulated by minors and other unqualified persons other than those who falsely verified the petitions, were validly counted. Reasoning that "[d]efects either in circulation or signatures deal with matters of form and procedure, but the filing of a false affidavit by a circulator is a much more serious matter involving more than a technicality." The *Brousseau* court held that allowing "the circulation of petitions by minors or other unqualified persons and certification of the petitions by persons other than the actual circulators without any sanction other than the inconvenience of showing that the signatures were in fact authentic would render the circulation requirement meaningless and possibly lead to additional falsehood and fraud by others."⁹ Plaintiffs have not alleged such falsehood and fraud here, only that Fair Share's circulators did not comply with Plaintiffs' interpretation of a compensation provision that has nothing to do with the signatures they collected. If the circulators had certified petitions they had not personally circulated, let alone petitions circulated by unqualified persons, that would raise an issue absent in this case concerning whether the petition signers were well informed when they gave their signatures as emphasized by *North West Cruiseship*. This is not the case, and so *Brousseau* merely shows Plaintiffs' claim falling far short of the reasoning it relies upon.

⁸ *Brousseau v. Fitzgerald*, 675 P.2d 713 (Ariz. 1984).

⁹ *Brousseau*, 675 P.2d at 455-56.

State ex rel. Schmelzer v. Board of Elections of Cuyahoga County,¹⁰ an Ohio case involving a circulator who was admittedly not a qualified elector as required by statute, has no application to this case beyond contrasting the express violation of a facial statutory requirement (and the apparent emphasis of Ohio law on strict compliance with statutes)¹¹ with the alleged and interpretative violation of a subsidiary statute that Plaintiffs claim here. The circumstances of *Schmelzer* are more akin to the two flawed petition pages excluded in *North West Cruiseship*, whereas the Fair Share circulators have not violated the express requirements of AS 15.45.130 but only Plaintiffs' interpretation of AS 15.45.110(c).

*Maine Taxpayers Action Network v. Secretary of State*¹² is entirely distinguishable from this case. The Maine court upheld the invalidation of 3,054 petition signatures because "(1) the circulator using the name of James Powell had sworn to a false identity and was, therefore, not who he purported to be according to his oath; (2) the circulator had used a false identity in registering to vote himself, and was therefore not a properly registered voter . . . and (3) the circulator was not a bona fide resident of Maine[.]"¹³ Given this fundamental fraud, the court reasoned that "[i]n addition to obtaining truthful information from the circulator, the oath is intended to assure that the circulator is impressed with the seriousness of his or her obligation to honesty . . . and to assure that the person taking the oath is clearly identified should questions

¹⁰ *State ex rel. Schmelzer v. Board of Elections of Cuyahoga County*,¹⁰ 440 N.E.2d 801 (Ohio 1982).

¹¹ *Id.* at 802.

¹² *Maine Taxpayers Action Network v. Secretary of State*, 795 A.2d 75 (Me. 2002).

¹³ *Id.* at 78.

arise regarding particular signatures.”¹⁴ As with *Brousseau*, the outright fraud regarding the circulator’s identity clearly calls his activities and collected signatures into question and is also clearly not present here.

So too does *Montanans for Justice v. State ex rel McGrath*¹⁵ involve what the trial court described as a “pervasive and general pattern and practice of fraud and procedural non-compliance” with circulators routinely attested to signatures they had not personally gathered, using false addresses, and employing a deceitful “bait and switch” tactic.¹⁶ Indeed, the Montana Supreme Court accepted the trial court’s finding that the circulators in that case engaged in outright deception “to induce people who knowingly signed one petition to unknowingly sign the other two.”¹⁷ Plaintiffs here have not alleged anything approaching such misconduct, and there is no legitimate analogy between the extreme circumstances of *Montanans for Justice*—that quotes and incorporates the reasoning of *Maine Taxpayers*¹⁸—and this case. The same goes the Oklahoma court cited by Plaintiffs in which the record is “replete with credible, unchallenged instances of actual fraud in the circulation of petitions. Not only were numerous petition circulators non-residents of this State, they engaged in outright fraud by using false addresses purportedly to satisfy Oklahoma law . . . [and] were encouraged to further the fraud and to hide true residential status by obtaining Oklahoma identification

¹⁴ *Id.* at 80.

¹⁵ *Montanans for Justice v. State ex rel. McGrath*, 146 P.3d 759 (Mont. 2006).

¹⁶ *Id.* at 770.

¹⁷ *Id.* at 775.

¹⁸ *Id.* at 777.

cards.”¹⁹ Plaintiffs have not alleged anything in this case to call the Fair Share circulators into similar question, and to imply such similarity is baseless at best.

Lastly, Plaintiffs cite to *Benca v. Martin*²⁰ that involves no allegations of fraud but merely the strict application of Oklahoma procedural requirements to invalidate signatures. As the State notes,²¹ *Benca* would have more persuasive relevance if the Fair Share circulators had violated one of the eight express requirements of AS 15.45.130, but they have not. If the circulators had failed to certify under AS 15.45.130(6) that they had not violated AS 15.45.110(c), then the lieutenant governor could not have counted the subscriptions as properly certified per the plain text of the statute. But they did so certify, and those certifications are only false under Plaintiffs’ overbroad interpretation of AS 15.45.110(c), which does not survive constitutional scrutiny as discussed in prior filings. Many of the statutory restrictions on circulations invoked by Plaintiffs’ outside citations are also tenuous under current federal precedent.

Moreover, even if that interpretation somehow prevails, it does not raise any question that the Alaskans who signed the petitions were anything but well informed in doing so and provides no justification for disenfranchising them as cautioned against in *North West Cruiseship*. Despite reaching across the country and grasping for inapplicable examples of

¹⁹ *In re Initiative Petition No. 379, State Question No. 726*, 155 P.3d 32, 46 (Okla. 2006).

²⁰ *Benca v. Martin*, 500 S.W.3d 742 (Ark. 2016)

²¹ State’s Reply at 12.

extreme fraud and strict statutory application, Plaintiffs cannot avoid the Alaska authority directing this Court to “liberally construe the constitutional and statutory requirements pertaining to the use of initiatives so that “the people [are] permitted to vote and express their will on the proposed legislation.”²²

III. CONCLUSION

Plaintiffs’ interpretation of AS 15.45.130 is contradicted by *North West Cruiseship* and the line of Alaska authority deferring to and protecting the initiative process. Plaintiffs’ case fails as a matter of law because the petition circulators properly certified the petitions under AS 15.45.130. Plaintiffs have not alleged a single improper signature among the 39,149 the lieutenant governor verified as correct or any reason to doubt that each signator was willing and well informed. Even if Plaintiffs’ unconstitutional interpretation of AS 15.45.110(c) is accepted, that statute has an express remedy, and this Court should not grant “a broader remedy that disenfranchises voters who did nothing wrong.”²³ For the reasons discussed above, and in the State’s separate filings, Fair Share urges the Court to deny Plaintiffs’ cross-motion and grant the motions to dismiss.

²² *Alaskans for Better Elections*, Supreme Court No. S-17629 at 7-8 n.19 (quoting *Boucher*, 528 P.2d at 462).

²³ *North West Cruiseship*, 145 P.3d at 587.

RESPECTFULLY SUBMITTED this 17th day of June, 2020.

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Certificate of Service

I hereby certify that a true and correct
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the following this 17th day of June 2020.

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

RESOURCE DEVELOPMENT COUNCIL)
FOR ALASKA, INC.; ALASKA TRUCKING)
ASSOCIATION, INC.; ALASKA MINERS)
ASSOCIATION, INC.; ASSOCIATED)
GENERAL CONTRACTORS OF ALASKA;)
ALASKA CHAMBER; and ALASKA)
SUPPORT INDUSTRY ALLIANCE,)

Plaintiffs,)

v.)

KEVIN MEYER, in his official capacity,)
as Lt. Governor of the State of Alaska;)
GAIL FENUMIAI, in her capacity as Director)
of the Alaska Division of Elections; the)
STATE OF ALASKA, DIVISION OF)
ELECTIONS; and VOTE YES FOR)
ALASKA'S FAIR SHARE,)

Defendants.)

FILED in the TRIAL COURTS
STATE OF ALASKA, THIRD DISTRICT

JUN 26 2020

Clerk of the Trial Courts

By _____ Deputy

Case No. 3AN-20-05901CI

REPLY IN SUPPORT OF PLAINTIFFS' CROSS-MOTION
FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

Despite the Alaska Supreme Court's unequivocal approval of the State of Alaska's invalidation of otherwise valid elector subscriptions in *North West Cruiseship Association v. State*,¹ Defendant Vote Yes for Alaska's Fair Share ("Vote Yes") continues to try to

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¹ *North West Cruiseship Association v. State*, 145 P.3d 573 (Alaska 2006).

convince this Court to grant its motion for summary judgment that invalidation of subscriptions is an impermissible remedy. It is certainly understandable that Vote Yes does not want supporting subscriptions to be invalidated, but it is disingenuous for Vote Yes to cite *North West Cruiseship Association* as support for its position that invalidation of subscriptions is not allowed. Alaska Supreme Court precedent makes clear that the State's invalidation of subscriptions gathered by a circulator who does not comply with the initiative statutes and regulations is absolutely permissible.

Plaintiffs request that the Court hold that invalidation is an appropriate remedy for the misconduct alleged in this lawsuit. Plaintiffs' request is well supported for the following reasons:

- AS 15.45.130 provides that "the lieutenant governor may not count subscriptions on petitions not properly certified at the time of filing or corrected before the subscriptions are counted." This statute prohibits the lieutenant governor from counting subscriptions that are not properly certified either at the time of filing or corrected before the lieutenant governor counts the subscriptions contained in the petition.
- AS 15.45.130 explains a petition is "properly certified" if the circulator signs an affidavit swearing, among other things, that he or she did not receive pay in excess of the statutory maximum.
- In *North West Cruiseship Association*, the Alaska Supreme Court approved of the lieutenant governor and Division of Elections' invalidation of otherwise valid elector subscriptions contained in two petitions because the circulators who certified those petitions did not properly disclose the "paid by" information on certain pages in those petitions. The Court did not reverse the State's invalidation of these signatures, and reasoned that they were properly invalidated because of the circulators' failure to follow the "paid by" requirements.

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Plaintiffs ask this Court to rule that the proper remedy for circulator affidavits which falsely certify compliance with the statutory maximum on circulator pay is the invalidation of all signatures supported by that circulator affidavit. Vote Yes makes unpersuasive arguments in opposition to Plaintiffs' motion for summary judgment.² Below, Plaintiffs explain why Vote Yes's argument should be rejected.

II. VOTE YES'S INTERPRETATION OF AS 15.45.130 IS ILLOGICAL AND WOULD RENDER THE CERTIFICATION REQUIREMENT MEANINGLESS

Vote Yes asks this Court to rule that the truthfulness of a circulator's affidavit has no bearing on the validity of the subscriptions gathered by that circulator.³ This position is not only wrong, but would render the certification process of petitions ineffectual and meaningless. To the contrary, because of the circulator's central importance in the initiative process, this Court should follow the state supreme court decisions from Arizona, Oklahoma, Arkansas, Montana, Ohio, and Maine, discussed at length in Plaintiffs' opening brief, that a circulator's failure to follow the initiative laws renders the subscriptions collected by that circulator invalid.

AS 15.45.130 provides, in full:

Before being filed, each petition shall be certified by an affidavit by the person who personally circulated the petition. In determining the sufficiency of the petition, the lieutenant governor may not count subscriptions on petitions not properly certified at the time of filing or corrected before the subscriptions are counted. The affidavit must state in substance

² Fair Share's Opposition to Plaintiffs' Cross-Motion for Partial Summary Judgment (June 17, 2020) (hereinafter "Vote Yes's Opposition").

³ *Id.* at 3-5.

- 1) that the person signing the affidavit meets the residency, age, and citizenship qualifications for circulating a petition under AS 15.45.105;
- 2) that the person is the only circulator of that petition;
- 3) that the signatures were made in the circulator's actual presence;
- 4) that, to the best of the circulator's knowledge, the signatures are the signatures of the persons whose names they purport to be;
- 5) that, to the best of the circulator's knowledge, the signatures are of persons who were qualified voters on the date of signature;
- 6) that the circulator has not entered into an agreement with a person or organization in violation of AS 15.45.110(c);
- 7) that the circulator has not violated AS 15.45.110(d) with respect to that petition; and
- 8) whether the circulator has received payment or agreed to receive payment for the collection of signatures on the petition, and, if so, the name of each person or organization that has paid or agreed to pay the circulator for collection of signatures on the petition.

Vote Yes asserts that AS 15.45.130 is satisfied so long as the circulator submits an affidavit that states they conformed their circulating conduct to the requirements of (1) through (8) of this statute, even if the affidavit is false.⁴ Despite AS 15.45.130 stating that “the lieutenant governor may not count subscriptions on petitions not properly certified,” Vote Yes asserts that a circulator affidavit that falsely certifies compliance with subsections (1) through (8) still “properly certifie[s]” the petition it supports.⁵

Vote Yes comes to this tortured position by following the State Defendants’ lead in arguing that the proper remedy for a circulator’s false statements in a circulator affidavit are the criminal punishments located at AS 15.45.110(e), which makes it a class B misdemeanor for a circulator to receive payment or agree to receive payment and for a

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⁴ Vote Yes’s Opposition at 3 (“The Requirements of AS 15.45.130 Have Been Satisfied.”).

⁵ *Id.*

person to agree to pay or pay a circulator in excess of the statutory maximum. In Vote Yes's and the State Defendants' eyes, because there is a criminal punishment for exceeding the maximum statutory pay, the circulator's false statements in certifying the petition should have no effect on the validity of the subscriptions collected by the circulator. This argument is unpersuasive, however, because it would render much of AS 15.45.130 meaningless.

AS 15.45.130(6) is the only portion of AS 15.45.130 that discusses the maximum pay a circulator may receive. The other subsections of AS 15.45.130—subsections (1)-(5) and (7)-(8)—require the circulator to swear: to their true identity, that they meet the requirements to be a circulator under Alaska law, that he or she was the only circulator of the petition, that the signatures were gathered in the circulator's presence, that the circulator did not induce any of the subscribers to sign the petition, and more. According to Vote Yes's requested ruling, a circulator need not follow any of these requirements in order to have subscriptions in his or her petition count. A circulator may lie as to their identity, allow many other circulators to circulate the petition, allow subscribers to sign the petition outside their presence, and so long as the circulator submits a false affidavit, the signatures he or she gathered should count. There is no explicit criminal punishment in the initiative statutes for a circulator's false certification of the requirements in AS 15.45.130(1)-(5), (7)-(8). And yet, Vote Yes argues that because there are criminal punishment for violating AS 15.45.130(6) (class B misdemeanor), it matters not to the validity of the subscriptions that an affidavit is false or fraudulent.

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This Court should reject Vote Yes's illogical interpretation of AS 15.45.130 that renders circulators free to provide false information required by subsections (1)-(5), (7)-(8) without affecting the validity of the subscriptions they collected. Plaintiffs' interpretation gives plain meaning to the words of AS 15.45.130, and requires the certification contain truthful statements required by all subsections of the statute.⁶

III. THE ALASKA SUPREME COURT'S RECENT DECISION IN *MEYER V. ALASKANS FOR BETTER ELECTIONS* DOES NOT COUNSEL A DIFFERENT RESULT

At the outset of Vote Yes's Opposition, Vote Yes reproduces footnote 19 of the Alaska Supreme Court's decision in *Meyer v. Alaskans for Better Elections*.⁷ According to Vote Yes, that footnote reminds readers that the Alaska Supreme Court has "reaffirmed its commitment to liberally construing the initiative process to protect the constitutional rights of Alaskans[.]"⁸ Plaintiffs have no quarrel with Vote Yes's take-away from the footnote, and agree that the Alaska Supreme Court has so stated. But, that general rule

⁶ Vote Yes tries to gain ground by defeating the strawman argument that the lieutenant governor should not be *required* to investigate the truthfulness of every circulator affidavit. See Vote Yes's Opposition, at 3-4. Plaintiffs never alleged that the lieutenant governor was required to investigate the truthfulness of every circulator statement on the multitude of petition affidavits. In this case, Plaintiffs argue that *if* the lieutenant governor obtains evidence that circulator affidavits contain false statements—here, through prosecution of this lawsuit and discovery from Advanced Micro Targeting, Inc.—then he must invalidate the petitions supported by that false affidavit in compliance with AS 15.45.130.

⁷ *Meyer v. Alaskans for Better Elections*, ___ P.3d ___, Op. No. 7460 (Alaska, June 12, 2020), available online at: <https://appellate-records.courts.alaska.gov/CMSPublic/Home/Opinions?isCOA=False>.

⁸ Vote Yes's Opposition at 2.

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cannot override the plain words of AS 15.45.130, which prohibit the lieutenant governor from counting subscriptions that are not properly certified by circulator affidavit.

As noted above, Plaintiffs' motion for partial summary judgment asks for a ruling that the proper remedy for subscriptions that are supported by a circulator affidavit containing false statements is the invalidation of those subscriptions. Under AS 15.45.130, the lieutenant governor and the State should be prohibited from counting subscriptions that are not properly certified with a truthful circulator affidavit.

Meyer v. Alaskans For Better Elections and the cases it cites in footnote 19 do not counsel for a different result. In *Meyer*, the Alaska Supreme Court was tasked with determining whether an initiative violated the one-subject rule contained in article II, section 13 of the Alaska Constitution.⁹ The *Meyer* Court ruled that the 19AKBE initiative did not violate the one-subject rule because all of its provisions dealt with one subject—"election reform"—despite 19AKBE's change of Alaska's party-based primary system, establishment of ranked-choice voting, and new APOC disclosure and disclaimer requirements.¹⁰ In the process of explaining the initiative process, the *Meyer* Court

⁹ *Meyer*, Slip Op., at 9. Article II, Section 13 provides, in full:

Every bill shall be confined to one subject unless it is an appropriation bill or one codifying, revising, or rearranging existing laws. Bills for appropriations shall be confined to appropriations. The subject of each bill shall be expressed in the title. The enacting clause shall be: "Be it enacted by the Legislature of the State of Alaska."

¹⁰ *Id.* at 29.

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rehashed its previous rule statements from initiative cases in footnote 19.¹¹ *Meyer* did not deal with circulator requirements, nor the meaning of AS 15.45.130 in any way whatsoever.

The cases cited in footnote 19 are equally unhelpful. Those cases deal with whether the substance of an initiative violates the constitution, not whether circulators engaged in illegal conduct in gathering enough signatures to put the initiative on the ballot. *City of Fairbanks v. Fairbanks Convention and Visitors Bureau*¹² ruled that a voter initiative that sought to derive new hotel bed taxes did not violate article II, § 7's prohibition against initiatives that make or repeal appropriations or dedicate revenues because the city council remained free to allocate the tax revenues as it desired. In *Thomas v. Bailey*,¹³ the Court ruled that a voter initiative that sought to make 30 million acres of state land open to homesteading for Alaskan residents violated article II, § 7's prohibition against initiatives making appropriations. *Boucher v. Engstrom*¹⁴ decided that the initiative to move the state capital from Juneau to somewhere other than Fairbanks and Anchorage was not unconstitutional "special or local legislation" prohibited by article II, § 7. And finally, in *Municipality of Anchorage v. Frohne*,¹⁵ the Court ruled that the initiative that created the

¹¹ *Id.* at 7-8.

¹² *City of Fairbanks v. Fairbanks Convention and Visitors Bureau*, 818 P.2d 1153 (Alaska 1991).

¹³ *Thomas v. Bailey*, 595 P.2d 1 (Alaska 1979).

¹⁴ *Boucher v. Engstrom*, 528 P.2d 456 (Alaska 1974).

¹⁵ *Municipality of Anchorage v. Frohne*, 568 P.2d 3 (Alaska 1977).

Municipality of Anchorage did not violate the Alaska Constitution's limitation on initiatives to the same areas that the Legislature may legislate.¹⁶

None of these cases, which all deal with the Alaska Constitution's content restrictions for initiatives, apply to the statutory process for lawfully obtaining enough subscriptions to put an initiative on the ballot.

Nothing in *Meyer*, *City of Fairbanks*, *Boucher*, or *Frohne* changes the proper analysis of AS 15.45.130, which is part of the legislatively-mandated signature gathering process. These cases, which deal with whether the *substance* of different initiatives are unconstitutional, do not have bearing on whether a circulator's failure to properly certify the subscriptions he or she collected renders those subscriptions invalid. AS 15.45.130, *North West Cruiseship Association*, and the persuasive cases from other state supreme courts provide that answer.

IV. VOTE YES'S ATTEMPT TO DISTINGUISH CASES FROM THE SUPREME COURTS OF OHIO, ARIZONA, MONTANA, OKLAHOMA, MAINE, AND ARKANSAS IS UNAVAILING

Vote Yes fails to offer a convincing reason to reject the persuasive decisions of other state courts in *Brousseau v. Fitzgerald*,¹⁷ *State ex rel. Schmelzer v. Board of Elections of Cuyahoga County*,¹⁸ *Maine Taxpayers Action Network v. Secretary of State*,¹⁹ *Montanans*

¹⁶ *Id.* at 8.

¹⁷ *Brousseau v. Fitzgerald*, 675 P.2d 713 (Ariz. 1984).

¹⁸ *State ex rel. Schmelzer v. Board of Elections of Cuyahoga County*, 440 N.E.2d 801 (Ohio 1982).

¹⁹ *Maine Taxpayers Action Network v. Secretary of State*, 795 A.2d 75 (Me. 2002).

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for Justice v. State ex rel. McGrath,²⁰ *Benca v. Martin*,²¹ and *In re Initiative Petition No. 379, State Question No. 726*.²² Of course, others states have different constitutional provisions and statutory schemes than Alaska. But, these cases establish that a circulator's false certification of its signature gathering activities renders invalid the subscriptions gathered by that circulator.

Vote Yes correctly recognizes that *Brousseau v. Fitzgerald* reasoned that the counting of subscriptions supported by a false circulator affidavit would render the circulator affidavit requirements meaningless and would promote falsehood and fraud by others.²³ Therefore, the *Brousseau* Court invalidated the subscriptions supported by the false circulator affidavits.²⁴ That is precisely what Plaintiffs argue in this case—that the Court's failure to invalidate the subscriptions supported by false circulator affidavits in accordance with AS 15.45.130 will promote fraud and circulator falsehoods in the future.

State ex rel. Schmelzer involved a circulator who falsely certified she was a qualified resident who could be a circulator, when, in fact, she was not an Ohio resident.²⁵ The Ohio Supreme Court affirmed invalidation of all signatures collected by this circulator, and

²⁰ *Montanans for Justice v. State ex rel. McGrath*, 146 P.3d 759 (Mont. 2006).

²¹ *Benca v. Martin*, 500 S.W.3d 742 (Ark. 2016).

²² *In re Initiative Petition No. 379, State Question No. 726*, 155 P.3d 32, 46 (Okla. 2006).

²³ Vote Yes's Opposition at 6.

²⁴ *Brousseau*, 675 P.2d at 716.

²⁵ *State ex rel. Schmelzer*, 440 N.E.2d at 802-03.

upheld the statutory requirement that the circulator truthfully swear she was an Ohio resident in order to gather valid subscriptions.²⁶

Vote Yes attempts to distinguish *Maine Taxpayers Action Network* because the circulator in that case used a false identity and residency to collect otherwise valid subscriptions. While Vote Yes says this case is distinguishable, it fails to explain why that is so when they ask to allow initiatives to go forward unless the subscriptions are invalid. In other words, Vote Yes has not explained when circulator misconduct should not invalidate otherwise valid subscriptions (like it would like to do in this case) and when circulator misconduct should invalidate otherwise valid subscriptions (like occurred in *Maine Taxpayers Action Network*). There is no logical difference, and Vote Yes is merely arguing self-serving results for this case.

Likewise Vote Yes does not explain why the circulators' use of false residencies and personal addresses in *In re Initiative Petition No. 379, State Question No. 726*²⁷ should be grounds to invalidate otherwise valid elector subscriptions in that case but false certifications in this case involving circulator pay should not invalidate otherwise valid elector subscriptions.

The same goes for the Montana Supreme Court's decision in *Montanans for Justice v. State ex rel. McGrath* to invalidate 64,463 otherwise valid subscriptions.²⁸ While that

²⁶ *Id.*

²⁷ *In re Initiative Petition No. 379*, 155 P.3d at 46.

²⁸ *Montanans for Justice v. State ex rel. McGrath*, 146 P.3d 759 (Mont. 2006).

case involved a circulator who used “bait and switch” tactics that resulted in subscribers likely signing both petitions when they only intended to sign one petition, it also involved circulators who falsely swore to the location of their physical addresses in Montana and that they had personally viewed all subscribers sign the petition.²⁹ Vote Yes never explains why the Montana voters who signed these petitions should have their signatures disqualified because the circulators provided false residency information and a false statement about viewing each signature to the state, but the subscriptions in support of 19OGTX supported by false affidavits regarding circulator pay should not be invalidated. There is no material difference.

Finally, Vote Yes attempts to distinguish the Arkansas Supreme Court’s 2016 decision in *Benca v. Martin* by simply saying the case involved “the strict application of [Arkansas] procedural requirements to invalidate signatures.”³⁰ Arkansas statute requires circulators to submit an affidavit listing name, residency and other information *prior to gathering signatures*.³¹ The Arkansas Supreme Court upheld invalidation of 1,040 subscriptions and ordered the initiative to stay off the ballot after circulators in support of the initiative collected subscriptions *prior to* submitting their affidavit to the state³² Likewise, here, AS 15.45.130 provides that the lieutenant governor may not count subscriptions that are not properly certified, and false affidavits are not proper certification.

²⁹ *Id.* at 775-76.

³⁰ *Benca v. Martin*, 500 S.W.3d 742 (Ark. 2016).

³¹ *Id.* at 746.

³² *Id.*

All of Vote Yes's attempts to render the above-described cases irrelevant to this Court's decision on the cross-motions for summary judgment fall flat. These cases persuasively demonstrate that a circulator's false statement on an affidavit, whether it results in fraudulent subscriptions or not, renders all subscriptions supported by that affidavit invalid.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court grant their motion for partial summary judgment and rule that, in accordance with AS 15.45.130, the proper remedy for the submission of a circulator affidavit that contains a false statement renders the subscriptions supported by that affidavit invalid. This case is not about "disenfranchising voters" but rather is about whether Alaska statutes mean what they say. Notably, Vote Yes never argues that the complaint in this case is factually wrong. Instead, they ask the Court to condone the fraudulent, unlawful conduct of their signature gatherers. The Court should reject this invitation, and instead hold AS 15.45.130 means what it says, and that the Lt. Governor errs if he counts subscriptions that were not properly certified.

DATED at Anchorage, Alaska this 26th day of June, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of June, 2020, a true and correct copy of the foregoing was served by email upon the following:

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REPLY IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT
DEVELOPMENT COUNCIL, INC. ET AL. V. FENUMIAI AND DIVISION OF ELECTIONS
CASE NO. 3AN-20-05901 CI

PAGE 14 OF 14

EXC 220

000154

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

2020 JUL -6 PM 4:05

CLERK OF THE JUDICIAL COURTS

BY _____
DEPUTY CLERK

RESOURCE DEVELOPMENT COUNCIL)
FOR ALASKA, INC.; ALASKA TRUCKING)
ASSOCIATION, INC.; ALASKA MINERS)
ASSOCIATION, INC.; ASSOCIATED)
GENERAL CONTRACTORS OF ALASKA;)
ALASKA CHAMBER; and ALASKA)
SUPPORT INDUSTRY ALLIANCE,)

Plaintiffs,)

v.)

KEVIN MEYER, in his official capacity,)
as Lt. Governor of the State of Alaska;)
GAIL FENUMIAI, in her capacity as Director)
of the Alaska Division of Elections; the)
STATE OF ALASKA, DIVISION OF)
ELECTIONS; and VOTE YES FOR)
ALASKA'S FAIR SHARE,)

Defendants.)

Case No. 3AN-20-05901CI

¹⁰
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs move this Court, in accordance with Rule 56 of the Alaska Rules of Civil Procedure, for summary judgment. The undisputed facts show that the professional circulators employed by Advanced Micro Targeting, Inc. ("AMT") on behalf of Vote Yes for Alaska's Fair Share, were compensated in excess of \$1 a signature for the collection of signatures for the 19OGTX petition. In recent discovery, AMT produced its payment records showing that it compensated all circulators above \$1 for every signature obtained in support of 19OGTX. Given these undisputed facts,

1 Plaintiffs move for summary judgment on the following:

- 2
- 3 • AMT and AMT-paid circulators violated AS 15.45.110(c) by entering
4 into agreements that resulted in AMT-paid circulators being
5 compensated in excess of \$1 per signature, for the collection of
6 signatures on a petition.
 - 7 • AMT-paid circulators falsely certified in their circulator affidavits
8 required by AS 15.45.130(6) that they were not paid in violation of
9 AS 15.45.110(c).
 - 10 • Pursuant to AS 15.45.130, the Lieutenant Governor and the Division
11 of Elections may not count subscriptions supported by circulator
12 affidavits that falsely certified compliance with the payment
13 restrictions of AS 15.45.110(c).

14 A proposed order accompanies this motion for the Court's convenience.

15 DATED at Anchorage, Alaska this 6th day of July, 2020.

16 SCHWABE, WILLIAMSON & WYATT, P.C.
17 Attorneys for Plaintiffs

18 By: 

19 Matthew Singer
20 Alaska Bar No. 9911072
21 Lee C. Baxter
22 Alaska Bar No. 1510085
23
24
25
26

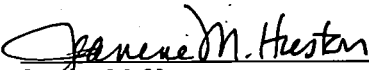
1 CERTIFICATE OF SERVICE

2 I hereby certify that on the 6th day of
3 July, 2020, a true and correct copy of
4 the foregoing was served by email
5 upon the following:

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7 Statewide Section Chief
8 Attorney General's Office
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12 Attorney General's Office
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20 Jeanine M. Huston
21
22
23
24
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26

1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

2 THIRD JUDICIAL DISTRICT AT ANCHORAGE

3 RESOURCE DEVELOPMENT COUNCIL)
4 FOR ALASKA, INC.; ALASKA TRUCKING)
5 ASSOCIATION, INC.; ALASKA MINERS)
6 ASSOCIATION, INC.; ASSOCIATED)
7 GENERAL CONTRACTORS OF ALASKA;)
8 ALASKA CHAMBER; and ALASKA)
9 SUPPORT INDUSTRY ALLIANCE,)

10 Plaintiffs,)

11 v.)

12 KEVIN MEYER, in his official capacity,)
13 as Lt. Governor of the State of Alaska;)
14 GAIL FENUMIAI, in her capacity as Director)
15 of the Alaska Division of Elections; the)
16 STATE OF ALASKA, DIVISION OF)
17 ELECTIONS; and VOTE YES FOR)
18 ALASKA'S FAIR SHARE,)

19 Defendants.)

Filed in the Trial Courts
State of Alaska Third District

JUL - 6 2020

Clerk of the Trial Courts
By _____ Deputy

Case No. 3AN-20-05901CI

20 PLAINTIFFS' MEMORANDUM IN
21 SUPPORT OF MOTION FOR SUMMARY JUDGMENT
22 WITH EXHIBITS A-K

23 FILED UNDER SEAL IN COMPLIANCE WITH
24 JUNE 25, 2020 PROTECTIVE ORDER
25
26

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Alaska's Fair Share

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

RESOURCE DEVELOPMENT COUNCIL)
FOR ALASKA, INC.; ALASKA TRUCKING)
ASSOCIATION, INC.; ALASKA MINERS)
ASSOCIATION, INC.; ASSOCIATED)
GENERAL CONTRACTORS OF ALASKA;)
ALASKA CHAMBER; ALASKA SUPPORT)
INDUSTRY ALLIANCE,)

Plaintiffs,

v.

KEVIN MEYER, in his official capacity)
as Lt. Governor of the State of Alaska;)
GAIL FENUMIAI, in her capacity as Director)
of the Alaska Division of Elections; the)
STATE OF ALASKA, DIVISION OF)
ELECTIONS; and VOTE YES FOR)
ALASKA'S FAIR SHARE,)

Defendants.

Case No. 3AN-20-05901CI

**FAIR SHARE'S OPPOSITION
TO PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT**

**FILED UNDER SEAL IN COMPLIANCE WITH
JUNE 25, 2020, PROTECTIVE ORDER**

FAIR SHARE'S OPPOSITION TO SUMMARY JUDGMENT
RDC v. Meyer, No. 3AN-20-05901 CI

July 9, 2020
Page 1 of 5

EXC 225
CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER IN 3AN-20-05901CI

000523

2020 JUL 10 11:54 AM
CLERK OF COURT

2020 JUN 14 PM 2:30

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

RESOURCE DEVELOPMENT COUNCIL)
FOR ALASKA, INC.; ALASKA TRUCKING)
ASSOCIATION, INC.; ALASKA MINERS)
ASSOCIATION, INC.; ASSOCIATED)
GENERAL CONTRACTORS OF ALASKA;)
ALASKA CHAMBER; and ALASKA)
SUPPORT INDUSTRY ALLIANCE,)

Plaintiffs,)

v.)

KEVIN MEYER, in his official capacity,)
as Lt. Governor of the State of Alaska;)
GAIL FENUMIAI, in her capacity as Director)
of the Alaska Division of Elections; the)
STATE OF ALASKA, DIVISION OF)
ELECTIONS; and VOTE YES FOR)
ALASKA'S FAIR SHARE,)

Defendants.)

Case No. 3AN-20-05901CI

¹⁰
PLAINTIFFS' REPLY IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

CONFIDENTIAL

FILED UNDER SEAL IN COMPLIANCE
WITH JUNE 25, 2020 PROTECTIVE ORDER

EXC 226

000521

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

RESOURCE DEVELOPMENT COUNCIL)
FOR ALASKA, INC.; ALASKA TRUCKING)
ASSOCIATION, INC.; ALASKA MINERS)
ASSOCIATION, INC.; ASSOCIATED)
GENERAL CONTRACTORS OF ALASKA;)
ALASKA CHAMBER; and ALASKA)
SUPPORT INDUSTRY ALLIANCE,)

Plaintiffs,)

v.)

KEVIN MEYER, in his official capacity as)
Lt. Governor of the State of Alaska,)
GAIL FENUMIAI, in her capacity as Director)
Of the Alaska Division of Elections; the)
STATE OF ALASKA,)
DIVISION OF ELECTIONS;)
and VOTE YES FOR ALASKA'S FAIR)
SHARE,)

Defendants.)

Case No. 3AN-20-05901CI

**ORDER REGARDING MOTIONS TO DISMISS AND MOTIONS FOR
SUMMARY JUDGMENT**

This case involves a dispute over payment to petition circulators. But more than that, it also involves a dispute over fundamental constitutional rights. The petition, if approved by the voters, would change the oil and gas production tax for certain oil fields on the North Slope. Plaintiffs, a group of companies opposed to the petition "For Alaska's Fair Share,"¹ seek an order declaring that petition circulators were paid money in excess of the statutory limit of \$1 per signature, and an injunction preventing the State from counting voters' signatures on the petition because of payments made to the circulators. The Vote Yes defendants offer an alternative interpretation of the payment statutes, but also challenge its constitutionality. The State Defendants, for their part, challenge the remedy sought

¹ The Petition is formally known as 190GTX.

by Plaintiffs—disregard of all voters’ signatures gathered by the paid circulators. The State argues that remedy is inconsistent with the State’s responsibility under the applicable statute.

Ultimately, this case turns on the Court’s interpretation of two provisions of the election statutes governing initiatives, AS 15.45.110(c), and AS 15.45.130. The Alaska Constitution enshrines the right of the people to propose and enact laws by initiative, and to approve or reject acts of the legislature by referendum.² Also implicated are fundamental First Amendment rights to engage in core political speech.

Plaintiffs Resource Development Council for Alaska, Alaska Chamber, Alaska Miners Association, Alaska Support Industry Alliance, Alaska Trucking Association, and Associated General Contractors of Alaska (collectively referred to as “RDC” or “Plaintiffs”), have brought this action seeking declaratory judgment and an injunction against the State and sponsors of the ballot measure at issue. The state Defendants include the lieutenant governor and Director of the Division of Elections in their official capacities, along with the State Division of Elections (collectively referred to as the “State”). Defendant Vote Yes for Alaska’s Fair Share (“Fair Share” or “Vote Yes”) is the official ballot group for the state-wide initiative seeking a change in the oil and gas production tax. All parties are represented by counsel. Before the Court are three motions: 1) the State Defendants’ April 30, 2020 *Cross-Motion to Dismiss Pursuant to Alaska Civil Rule 12(b)(6)*;³ 2) Defendant Fair Share’s May 18, 2020, *Motion to Dismiss*; and 3) Plaintiffs’ June 2, 2020 *Cross Motion for Partial Summary Judgment*. These three motions are interrelated as they ask to the Court to interpret two provisions of Alaska’s election statutes relating to voter initiatives, AS 15.45.110(c) and AS 15.45.130.

For the reasons which follow, the Court grants the Defendants’ two Motions to Dismiss, and denies the Plaintiff’s Cross-Motion for Summary Judgment. The Court

² Alaska Const. art. XI, § 1.

agrees with the Plaintiffs' statutory interpretation of the signature payment statute, AS 15.45.110(c), but the statute is constitutionally flawed and therefore invalid. In addition, the Court agrees with the State's statutory interpretation of the circulator certification statute, AS 15.45.130. Alternatively, Plaintiffs' proposed remedy and request for injunctive relief—disregard of 39,000 valid signatures on the petition—is constitutionally flawed and would result in the disenfranchisement of thousands of Alaska voters who did nothing wrong.

I. ALASKA'S INITIATIVE PROCESS

Alaska allows its citizens to place propositions on the ballot through an initiative process.⁴ The initiative allows people the ability to introduce legislation through popular vote by allowing the citizens, through the collection of voter signatures, to propose legislation and make it law.⁵ Generally speaking, this process is known as direct democracy, which provides the opportunity for the people to draft legislation directly through “grass roots” efforts, as opposed to through the legislature. Petition circulation is “core political speech,” because it involves political change made through interactive communication.⁶ Although this kind of speech is protected by the First Amendment, there must also be regulation of elections to ensure they have qualities of fairness and honesty.⁷ This policy is to ensure that there is some order, rather than chaos, to accompany the democratic process.⁸

The process begins when an initiative is proposed by an application containing the specific bill to be initiated.⁹ The constitution restricts certain subjects

³ Defendants filed their motion in response to Plaintiff's Motion to Characterize Case as Non-Routine.

⁴ Alaska Const. art. XI, § 1; see also AS 15.45.010–.245 (stating procedures regarding initiative law-making).

⁵ See Ryan K. Manger, *Buckley v. American Constitutional Law Foundation: Can the State Preserve Direct Democracy for the Citizen, or Will It Be Consumed by the Special Interest Group?*, 19 St. Louis U. Pub. L. Rev. 177, 179 (2000) (describing the general process of direct democracy in the United States).

⁶ *Buckley v. Am. Constitutional L. Found., Inc.*, 525 U.S. 182, 186 (1999).

⁷ *Id.* at 187.

⁸ *Id.*

⁹ Alaska Const. art. XI, § 2.

from the initiative process.¹⁰ In addition, if at any time before the election, substantially the same measure has been enacted, the petition becomes void.¹¹ The application must be signed by at least 100 qualified voters as sponsors and is then filed with the lieutenant governor.¹² If it is in the proper form,¹³ then the lieutenant governor makes an initial certification.¹⁴ After certification of the application, a petition is prepared for circulation by the sponsors.¹⁵ By statute, petition circulators must meet certain residency requirements, and the amount they may be paid is limited to \$1 per signature.¹⁶ The petition must be signed by a minimum number of qualified voters located throughout the state. The minimum number is equal to at least ten percent (10%) of those who voted in the preceding general election, who are resident in at least three-fourths of the house districts of the State, and who, in each of those house districts, are equal in number to at least seven percent (7%) of those who voted in the preceding general election in the house district.¹⁷ Once the petition sponsors have obtained the required number of minimum signatures of qualified voters,¹⁸ the petition may be filed with the lieutenant governor.¹⁹ Before being filed, each petition must be certified by an affidavit of the person who personally circulated the petition.²⁰ Once filed, the lieutenant governor has sixty (60) days to review the petition and determine that it was properly filed.²¹ This process involves a review of whether petition has been signed by the proper number of qualified voters in the required number of house districts throughout the

¹⁰ Alaska Const. art. XI, § 7.

¹¹ Alaska Const. art. XI, § 4.

¹² Alaska Const. art. XI, § 2; see also AS 15.45.020 (filing of application).

¹³ See AS 15.45.030 (form of application).

¹⁴ Alaska Const. art. XI, § 2; see also AS 15.45.070 (review of application); 6 AAC 25.240.

¹⁵ AS 15.45.090 (preparation of petition).

¹⁶ AS 15.45.105 (qualifications of circulator); AS 15.45.110 (circulation of petition).

¹⁷ Alaska Const. art. XI, § 3.

¹⁸ The petition sponsors have one year to obtain the required signatures.

¹⁹ Alaska Const. art. XI, § 3.

²⁰ AS 15.45.130 (certification of circulator).

²¹ AS 15.45.150 (review of petition).

state.²² If the lieutenant governor determines the petition has been properly filed and meets criteria, then it is placed on the ballot for the voters to decide.²³

II. FACTS AND PROCEEDINGS

The Complaint indicates that in October, 2019 the Alaska Division of Elections provided printed booklets to the sponsors of the 19OGTX initiative.²⁴ Advanced Micro Targeting, a national professional signature gathering company was involved to collect the required signatures to put 19OGTX on Alaska's state-wide ballot.²⁵ There were apparently 786 signed petition booklets containing signatures in support of placing 19OGTX on the ballot, and 544 of them were submitted by circulators hired by Advanced Micro Targeting.²⁶ Those circulators swore that they had not "entered into an agreement with a person or organization in violation of AS 15.45.110(c)."²⁷ That section does not permit a circulator to be paid more than \$1 per signature. Plaintiffs allege they determined by public filings that Advanced Micro Targeting was paid \$72,500 by Vote Yes for Alaska's Fair Share. They further allege that Advanced Micro Targeting offered to pay its circulators more than the maximum \$1 per signature by advertising it would pay signature gatherers between \$3,500 to \$4,000 per month, expecting around 100 signatures per day, six days per week.²⁸ On April 10, 2020, Plaintiffs filed a complaint requesting declaratory and injunctive relief, requesting the Lieutenant Governor to invalidate petition booklets not properly certified and all subscriptions contained within those booklets.²⁹

The State Defendants brought a *Motion to Dismiss Pursuant to Alaska Rule 12(b)(6)*, arguing for the Court to hold that the signatures cannot be invalidated

²² AS 15.45.160.

²³ AS 15.45.180 and 15.4.190.

²⁴ Compl. at 4.

²⁵ Compl. at 4.

²⁶ Compl. at 5.

²⁷ Compl. at 5.

²⁸ Compl. at 5.

²⁹ Compl. at 8.

solely because “circulators were paid more than \$1 per signature.”³⁰ The State argues that the Alaska Supreme Court construes the initiative statutes liberally to protect the right of the people to propose and enact laws, and that this Court should construe statutes to avoid the “wholesale disenfranchisement of qualified electors.”³¹ Significantly, the State also contends that the initiative statutes do not require anything more than a “facial review” of the circulator certifications by the Lieutenant Governor, a requirement that was already met in this case.

Plaintiffs oppose the State’s motion, arguing that Alaska law prohibits the Lieutenant Governor from counting petition signatures that are supported by false circulator affidavits. Plaintiffs also assert that Defendants’ position ignores the intent of the legislature, and that Plaintiffs’ position is supported by both Alaska law and law from other states. For these reasons, Plaintiffs contend the Complaint pleads a proper cause of action (for injunction and declaratory relief) and request a denial of the *Motion to Dismiss*.

Fair Share has joined in the State’s Motion and arguments, but also filed a separate *Motion to Dismiss* on May 18, 2020. Fair Share contends that Plaintiffs’ interpretation of AS 15.45.110(c)—restricting any form of payment if it exceeds \$1 per signature—would be an unconstitutional restriction on free speech. Arguing against the Plaintiffs’ statutory interpretation, Fair Share also alleges that the legislative history shows the statute should only apply to compensation made per signature, and that the remedy is not disenfranchisement of voters.

Plaintiffs oppose Fair Share’s *Motion to Dismiss*, and also filed their own *Cross Motion for Partial Summary Judgment*. Plaintiffs argue that the statute (AS 15.45.110(c)) is not unconstitutional, and that the legislative history actually supports the conclusion that the payment limitation applies to all types of compensation. In Plaintiffs’ view, no more than \$1 per signature may be paid regardless of the method of payment (or the amount of time it takes to collect the signatures). Plaintiffs also

³⁰ State Def.’s Cross-Mot to Dismiss at 14 (Apr. 30, 2020).

urge the Court to hold that AS 15.45.130 strictly prohibits the Lieutenant Governor from counting subscriptions (signatures) supported by a false statement. Defendant Fair Share opposes Plaintiffs' *Cross Motion*.

III. DISCUSSION

The parties in this case have raised issues regarding interpretation of two key provisions of the initiative statutes: AS 15.45.110(c) and AS 15.45.130. Then, the Court is faced with the question posed by the Vote Yes defendants: whether the prohibition on circulator payment greater than \$1 per signature under AS 15.45.110(c) is an unconstitutional restriction on political speech.

A. Statutory Construction

"The goal of statutory construction is to give effect to the legislature's intent, with due regard for the meaning the statutory language conveys to others."³² This involves consideration of "three factors: the language of the statute, the legislative history, and the legislative purpose behind the statute."³³ The court is to adopt "the rule of law that is most persuasive in light of precedent, reason, and policy."³⁴

The Alaska Supreme Court has "rejected a mechanical application of the plain meaning rule in favor of a sliding scale approach."³⁵ However, the language of the statute is the "primary guide." It is presumed "that every word in the statute was intentionally included, and must be given some effect."³⁶ "The language of the statute is 'construed in accordance with [its] common usage,' unless the word or

³¹ State Def.'s Cross-Mot to Dismiss at 10.

³² *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 905 (Alaska 1987).

³³ *Western Star Trucks, Inc. v. Big Iron Equipment Service, Inc.*, 101 P.3d 1047, 1050 (Alaska 2004).

³⁴ *L.D.G., Inc. v. Brown*, 211 P.3d 1110, 1133 (Alaska 2009) (citing *Enders v. Parker*, 66 P.3d 11, 13–14 (Alaska 2003)).

³⁵ *Municipality of Anchorage v. Suzuki*, 41 P.3d 147, 150 (Alaska 2002).

³⁶ *Id.* at 151.

phrase in question has ‘acquired a peculiar meaning, by virtue of statutory definition or judicial construction.’”³⁷

As noted above, in Alaska the voters’ ability to bypass the legislature and enact laws by initiative is a right guaranteed by the state constitution.³⁸ The requirements of the constitutional and statutory provisions regarding the use of initiatives should be liberally construed so that the people are permitted to vote and express their will on proposed legislation. As such, all doubts as to technical deficiencies or failure to comply with the exact letter of procedure are resolved in favor of permitting the people to vote.³⁹

With these principles in mind, the starting point for the Court’s analysis is the language of the statutes, and the parties’ competing interpretations.

B. Does AS 15.45.110(c) Prohibit Any Type of Payment to Petition Circulators, if Those Payments Effectively Pay Circulators More Than \$1 Per Signature?

As noted above, Alaska determines the meaning of statutory language beginning with the plain meaning of the statutory text.⁴⁰ The legislative history of a statute can sometimes suggest a different meaning, but “the plainer the language of the statute, the more convincing contrary legislative history must be.”⁴¹ “Even if legislative history is ‘somewhat contrary’ to the plain meaning of a statute, plain meaning still controls.”⁴²

AS 15.45.110 provides for circulation of petitions, certain prohibitions and penalties for violation. The statute provides in pertinent part:

(c) A circulator may not receive payment or agree to receive payment that is greater than \$1 a signature, and a person or organization may

³⁷ *Id.* at 150–51 (quoting *Muller v. BP Exploration (Alaska) Inc.*, 923 P.2d 783 788 (Alaska 1996)).

³⁸ Alaska Const. art. XI, § 4.

³⁹ *Boucher v Engstrom*, 528 P.2d 456, 462 (Alaska 1974), *overruled on other grounds by McAlpine v Univ. of Alaska*, 762 P.2d 81 (Alaska 1988); *see also*, *Thomas v Bailey*, 595 P.2d 1, 3 (Alaska 1979).

⁴⁰ *Hendricks-Pearce v. State, Dep’t of Corr.*, 323 P.3d 30, 35 (Alaska 2014).

⁴¹ *Id.* (quoting *Ward v. State, Dep’t of Pub. Safety*, 288 P.3d 94, 98 (Alaska 2012)).

⁴² *Id.* (quoting *Estate of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 387 (Alaska 2013)).

not pay or agree to pay an amount that is greater than \$1 a signature, for the collection of signatures on a petition.

(d) A person or organization may not knowingly pay, offer to pay, or cause to be paid money or other valuable thing to a person to sign or refrain from signing a petition.

(e) A person or organization that violates (c) or (d) of this section is guilty of a class B misdemeanor.⁴³

In this case, Plaintiffs argue the language of the statute is clear and unequivocal—\$1 per signature is the maximum amount that can be paid to collect signatures on a petition, no matter what. Defendant Fair Share argues in its *Motion to Dismiss* that AS 15.45.110(c) does not restrict all forms of compensation for petition circulators. Fair Share contends that Plaintiffs' interpretation is incorrect, and that if the Court interpreted the statute to restrict all types of compensation, it would be an unconstitutional restriction on free speech. The constitutional concerns are addressed below. But first, does the statute actually prohibit any *form* of payment if it ends up being greater than \$1 per signature, or does it only prohibit *signature-based* payment?

The plain meaning of the words suggest no ambiguity. Petition circulators may not *receive* payment that is greater than \$1 per signature. The wording of the statute does not suggest it is capable of supporting Fair Share's interpretation. There is no discussion about the "form of payment." Instead, the language restricts the "amount of payment." A simple reading the plain words shows that if a circulator received payment that ended up being greater than \$1 per signature, no matter how it was received, it seems the statute would prohibit it.

Defendant Fair Share argues that the legislative history shows that the statute was originally introduced to prohibit the *signature-based type of payment* and leave other forms of payment unrestricted. In support of this argument, Fair Share points to excerpts from the legislative history.

⁴³ AS 15.45.110(c)–(e).

In the Senate Judiciary Committee meeting held on March 18, 1998, Senator Sharp was the proponent of Senate Bill 313, which in part concerned the \$1 limit portion of AS 15.45.110(c). Senator Sharp stated:

And [Senate Bill 313] also prohibits payment per signature by the sponsor. Payment would still be allowed by the hour or any other method. And the reason for that, Mr. Chairman, is that Leg Legal has said that, in the Lower 48 where they prohibited payments of any kind for obtaining signatures of an initiative, it was declared [sic] unconstitutional restraint of the process. But they do believe other states have at least prohibited payments by the signature, and that has stood up in court so far. So this proposed legislation would do that.⁴⁴

And so it is true that, at the very least, the bill was introduced intending to restrict the very signature-based payments that are at issue here. But analysis of the legislative history does not stop there. Plaintiffs argue that although the bill was introduced with that intent, it was revised in the House and eventually enacted in a form that restricted payments of any type. The original language of Senate Bill 313 contained substantially different language than the current statute. The original Bill as introduced in the Senate proposed language containing a crucial statement: "*This subsection does not prohibit a sponsor from being paid an amount that is not based on the number of signatures collected.*"⁴⁵ But the finally enacted legislation omitted that language. When the Bill was debated in the House, Representative Davies voiced a concern over removing the original language, stating:

I don't understand what the state interest is in slowing down getting signatures. But let me just say one other thing about the—the amendment would limit the amount of money that you could pay, and the existing language [from the original Bill] only limits the way in which you make payment. It doesn't limit the amount. You could pay the guy 100 bucks an hour if you want. There's no limit to how much you're paying.⁴⁶

⁴⁴ Hearing on S.B. 313 before the S. Judiciary Comm., 1998 Leg., 20th Sess. 20–21 (Alaska Mar. 18, 1998) (Def. Fair Share's Ex. 1) (statement of Sharp).

⁴⁵ Senate Bill No. 313 (Feb. 2, 1998) (Pl.s' Ex. A) (emphasis added).

⁴⁶ Hearing on S.B. 313 before the H. Finance Comm., 1998 Leg., 20th Sess. 78–79 (Alaska Mar. 8, 1998) (statement of Rep. Davies).

And because of that difference—I think that the existing language is much less subject to the constitutional challenge than the amendment. The amendment gets closer to a—in fact, is a limit. It’s a hard limit in terms of how much you can pay. And as that—and I agree that it’s different than the exact court case, but I think it’s closer to the court case than the language that’s in the bill, and for that reason is more likely to be overturned than the bill—than the language in the bill.⁴⁷

This passage from the debate in the House shows that the critical language from the original Bill was intentionally amended out of the bill and replaced. The legislation as passed is plainly a restriction on all forms of payment. The present statutory language, unlike the language of the original Senate Bill, contains a very specific restriction on payment. It is as noted by Representative Davies “a hard limit in terms of how much you can pay.”⁴⁸

As Plaintiffs point out, the Legislature had another opportunity to permit other forms of payment in 2009, when House Bill 36 was introduced. That bill sought to add language to AS 15.45.110(c) stating that the subsection does not prohibit a person or organization from employing a circulator and paying an hourly wage or salary.⁴⁹ But again, the passed legislation did not include such language.

Returning to the statute as enacted, Senator Sharp noted that people might often assume “persons obtaining signatures on ballot initiatives are volunteers who believe strongly in a cause,” and therefore the goal of Senate Bill 313 was to bring the process back to a more grass roots effort.⁵⁰ Immediately, Senator Sharp was concerned with what kind of laws held constitutional muster in the Lower 48, and stated that as a reason for proposing the initial cap on payment by signature.⁵¹ It seems that the legislature attempted to get as close as possible to prohibiting payment to petition circulators, mindful of *Meyer v. Grant*.⁵²

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ House Bill No. 36 (Pl.s’ Ex. C).

⁵⁰ *Hearing on S.B. 313 before the S. Judiciary Comm., supra* note 44.

⁵¹ *Id.*

⁵² *Meyer v. Grant*, 486 U.S. 414 (1988), is discussed below.

Fair Share's argument that the statute allows other forms of payment, and only limits "per signature payments" ignores the plain language of the statute. While it certainly is true that the original intent of the bill would support Fair Share's reading, that is not what the language plainly says. To infer that the statute allows other forms of payment, even if doing so might exceed \$1 per signature, requires reading into the statute additional language that is simply absent. It is apparent, based on the plain language of the statute—and buttressed by the fact that the legislature had the opportunity to exempt other forms of payment yet chose not to do so—that AS 15.45.110(c) prohibits any form of payment if it ends up exceeding \$1 per signature gathered.

This Court cannot construe the statute to mean that monthly, hourly or salary type payments are permitted when the amount paid exceeds \$1 per signature. And it seems that, based on the transcripts of the 1998 hearings, the legislature was well aware of the constitutionality issue, and yet enacted the legislation with a hard limit of \$1 per signature regardless.

C. Does the \$1 Per Signature Payment Limit of AS 15.45.110(c) create an Unconstitutional Restriction on Political Speech?

"The Alaska Constitution provides that all political power is inherent in Alaska's people and 'founded upon their will only.'"⁵³ The people have the constitutional right to legislate directly by initiative.⁵⁴ And the people have the constitutional right to vote in any state or local election.⁵⁵ "The voters' right to enact laws by the initiative process requires the Court to interpret legislative procedures in favor of the exercise of the initiative power."⁵⁶

Petition circulation is core political speech because it involves interactive communication concerning political change, and First Amendment protection for

⁵³ *Meyer v. Alaskans for Better Elections*, No. S-17629, 2020 WL 3117316, at *1 (Alaska June 12, 2020).

⁵⁴ *Id.* at *1.

⁵⁵ Alaska Const. art. V, § 1.

⁵⁶ *N. W. Cruiseship Ass'n of Alaska, Inc. v State, Office of Lieutenant Governor, Division of Elections*, 145 P.3d 573, 582 (Alaska 2006).

such interaction is therefore at its zenith.⁵⁷ In considering a constitutional challenge to an election law, a court must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments against the precise interest put forward by the State as justifications for the burden imposed by its rule.⁵⁸ The United States Supreme Court has said repeatedly that curbs on core political speech are to be strictly construed.⁵⁹ Exacting scrutiny has been applied when the restrictions in question significantly inhibit communication with voters about proposed political change, and are not warranted by the state interests alleged to justify those restrictions.⁶⁰ A state's interest in ensuring the integrity of the election process and preventing fraud is compelling, but it bears the burden of proving that a regulation is narrowly tailored.⁶¹

Here, Fair Share argues that if AS 15.45.110(c) is interpreted to prohibit any type of payment that exceeds \$1 per signature, such interpretation would not constitutionally stand. In support of this assertion, Fair Share relies heavily on the United States Supreme Court case *Meyer v. Grant*, which held that a Colorado statute prohibiting the use of paid petition circulators abridged the right to engage in political speech, and was therefore unconstitutional.⁶² Freedom of Speech is guaranteed by the First Amendment to the United States Constitution, and is among "the fundamental personal rights and liberties which are secured to all persons."⁶³ The *Meyer* Court applied strict scrutiny because it determined that initiative petition

⁵⁷ *Nader v. Brewer*, 531 F.3d 1028, 1035 (9th Cir. 2008) (quotations omitted) (citing *Meyer*, 486 U.S. at 422, 425).

⁵⁸ *Id.* at 1034.

⁵⁹ See *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 499 (1985); *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley, Cal.*, 454 U.S. 290, 294 (1981); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978).

⁶⁰ *Buckley*, 525 U.S. at 193–94. "When a State's rule imposes severe burdens on speech or association, it must be narrowly tailored to serve a compelling interest; lesser burdens trigger less exacting review, and a State's important regulatory interests are typically enough to justify reasonable restrictions." *Id.* at 206 (J. Thomas, concurring).

⁶¹ *Nader*, 531 F.3d at 1037.

⁶² *Meyers*, 486 U.S. at 414.

⁶³ *Id.* (quoting *Thornhill v Alabama*, 310 U.S. 88, 95 (1940)).

circulation involves both the expression of a desire for political change and a discussion of the merits of the proposed change.⁶⁴

The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' Appellees seek by petition to achieve political change in Colorado; their right freely to engage in discussions concerning the need for that change is guarded by the First Amendment.⁶⁵

In its holding, the *Meyer* Court reasoned that the Colorado statute had an effect of restricting political expression by limiting the number of voices who convey the message and the hours they can speak, and so it limited the size of the audience they can reach.⁶⁶ The statute also made it less likely that the proponent of an initiative could garner the number of signatures necessary to place the matter on the ballot, limiting their ability to make the matter the focus of statewide discussion.⁶⁷ In essence, the prohibition against paid circulators had an inevitable effect of reducing the total amount of speech on a public issue.⁶⁸

The US Supreme Court was "not persuaded by Colorado's arguments that the prohibition is justified by its interest in making sure that an initiative has sufficient grass roots support to be placed on the ballot, or by its interest in protecting the integrity of the initiative process."⁶⁹ This is apparently what Senator Sharp was concerned with when Senate Bill 313 was introduced in 1998.⁷⁰ But *Meyer*, and other cases which follow make clear that an outright ban on payment to circulators is unconstitutional. And so the critical question now is whether a hard limit on payment of \$1 per signature, as opposed to an outright ban on payment like in *Meyer*, is also unconstitutional. Plaintiffs here face a high burden because the speech at issue is fundamental to our electoral process and at the core of the First Amendment freedoms.

⁶⁴ *Id.* at 422; see also *Buckley*, 525 U.S. at 206 (J. Thomas, concurring).

⁶⁵ *Meyer*, 486 U.S. at 421 (quoting *Roth v United States*, 354 U.S. 476, 484 (1957) (citations omitted)).

⁶⁶ *Id.* at 422.

⁶⁷ *Id.*

⁶⁸ *Id.*

Since the *Meyer* decision, courts in other jurisdictions have faced similar issues. The Ninth Circuit in *Nader v. Brewer*, decided after *Meyer*, faced the question of whether a statute requiring circulators to be Arizona residents was constitutional.⁷¹ In rejecting the residence requirement, the Ninth Circuit held that such a restriction was also unconstitutional, because the restriction was not narrowly tailored to further the state's interest in preventing fraud. While the Court recognized that prevention of fraud is a legitimate concern, the statutory restriction was not supported by any evidence that out-of-state circulators caused any more problems than other circulators.⁷²

In *Prete v. Bradbury*, the Ninth Circuit upheld an Oregon ballot measure that prohibited payment to circulators based on the number of signatures obtained.⁷³ The measure specified that it did not prohibit payment not based on the number of signatures.⁷⁴ The Ninth Circuit found that Oregon had an important regulatory interest in preventing fraud and its appearances in its electoral process.⁷⁵ But *Prete* did not apply strict scrutiny, because the plaintiffs in that case only established that the ballot measure imposed "lesser burdens" upon the initiative process.⁷⁶ And, it is important to note that *Prete* declined to hold that the ballot measure was facially constitutional.⁷⁷ Significantly, the measure upheld in *Prete*, is virtually the same as the *original* language proposed in SB 313. In light of the Ninth Circuit's decision, it would seem that Representative Davies' concern for the constitutionality of the amendment (now AS 15.45.110(c)) was prescient.

⁶⁹ *Id.* at 428.

⁷⁰ See *supra* Section III.B.

⁷¹ *Nader*, 531 F.3d at 1037.

⁷² *Id.* The state argued that the residency restriction was narrowly tailored to ensure that circulators were subject to the state's subpoena power, and so the state can locate them within the ten-day period allotted for petition challenges. *Id.* The court did not find that the state provided evidence to support the contention the professional petition circulators can be "nomadic," or that there was any history of fraud related to non-resident circulators. *Id.*

⁷³ The *Prete* court declined to hold the ballot measure facially constitutional, but held that it could not conclude the measure imposed a "severe burden" under the First Amendment. *Prete v. Bradbury*, 438 F.3d 949, 953 n.5 (9th Cir. 2006).

⁷⁴ *Id.* at 952.

⁷⁵ *Id.* at 969.

AS 15.45.110(c) is to be viewed with exacting scrutiny because the \$1 limit significantly inhibits communication about proposed political change.⁷⁸ As discussed above, AS 15.45.110(c) imposes a “hard limit” on the *amount* a circulator can be paid, no matter how he or she might be paid. In that way, it is unlike the Oregon ballot measure discussed in *Prete* because that measure permitted other forms of payment, and more similar to the outright ban on payment analyzed by the Supreme Court of the United States in *Meyer*. Similar to the outright ban of any payment discussed in *Meyer*, a hard limit of \$1 per signature would have the similar inevitable effect of reducing the total quantum of speech on a public issue. The \$1 limit may not be the same as the complete prohibition of payment that the *Meyer* Court faced, but \$1 per signature is only one small step higher.

The same fundamental policies that caused the Supreme Court to take pause similarly apply when a circulator can be paid pocket change as opposed to no pay whatsoever: the size of the audience proponents can reach is limited; it is less likely that proponents will garner the number of signatures necessary to place the matter on the ballot; and limits their ability to “make the matter the focus of statewide discussion.”⁷⁹ In fact, given Alaska’s geographic expanse, and the exacting restrictions imposed on by AS 15.45.140, the limited pay of \$1 per signature becomes almost meaningless.

An example illustrates the point. AS 15.45.140 requires that sponsors of an initiative petition obtain signatures from qualified voters across the state, both on the road system and off. 1) The petition must be signed by qualified voters equal in number to ten percent (10%) of those who voted in the previous general election; 2) They must reside in at least three-fourths of the house districts of the state; and 3) Within each of the house districts described above, there must be at least seven

⁷⁶ *Id.* at 952.

⁷⁷ *Id.* at 953 n.5.

⁷⁸ See *Buckley*, 525 U.S. at 193–94.

⁷⁹ See *Meyer*, 486 U.S. at 422.

percent (7%) who voted in the preceding general election in the house district.⁸⁰ Alaska has forty (40) house districts ranging from the North Slope to Southeast, and from Anchorage to the Aleutians.⁸¹ It is not enough for a circulator to stand on the sidewalk in front of a shopping mall in Anchorage and gather signatures. Under the statute, circulators are required to obtain signatures in the vast remote parts of the state as well. Presumably, this is to ensure that a petition for a statewide ballot has enough support on a statewide basis.

But the limitation imposed by the undifferentiated \$1 per signature payment present very different obstacles to political speech when Alaska's geographic differences are considered. A similar number of ballots may have been cast in the 2018 general election in house districts 20 and 32, but each district presents far different challenges for petition circulators. District 20 covers Downtown Anchorage while District 32 covers Kodiak, Cordova and Seldovia.⁸² The required number of signatures for an initiative (7%) is roughly the same (413 vs 439), but the effort necessary to assure the minimum number of signatures from each district is far different.⁸³ Given the First Amendment's fundamental policy to assure the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people," Alaska's \$1 per signature limit surely infringes on that fundamental right.⁸⁴

If strict scrutiny is to be applied to AS 15.45.110(c), then there must be a compelling state interest, and the statute must be narrowly tailored to fit that interest.⁸⁵ Even though an interest in ensuring the integrity of the election process

⁸⁰ AS 15.45.140(a)(1), (2), and (3).

⁸¹ State of Alaska, Div. of Election, *House and Senate District Designations* (Dec. 9, 2013), <https://www.elections.alaska.gov/doc/forms/H07.pdf> (House and Senate District designations based on "Proclamation of Redistricting" dated July 14, 2013).

⁸² *Id.*

⁸³ State of Alaska, Div. of Elections, *Public Information Packet on Initiatives 25* (Jan. 4, 2019), <https://www.elections.alaska.gov/doc/forms/H34.pdf>.

⁸⁴ See *Meyer*, 486 US at 421.

⁸⁵ See *Nader*, 531 F.3d at 1037.

and preventing fraud is compelling, the statute must still be narrowly tailored.⁸⁶ Plaintiffs argue that several states prohibit per-signature payment of circulators, implying that it means these interests have been upheld as being narrowly tailored or constitutional in some way. And in fact, the Second Circuit upheld a statute against a First Amendment challenge in *Person v. New York State Board of Elections*:

We join the Eighth and Ninth Circuit in holding that a state law prohibiting the payment of electoral petition signature gatherers on a per-signature basis does not per se violate the First or Fourteenth Amendments. Like our sister circuits, we find the record presented to use provides insufficient support for a claim that the ban on per-signature payment is akin to the complete prohibition on paying petition circulators that was deemed unconstitutional in *Meyer*, or that the *alternative methods of payment it leaves available are insufficient*.⁸⁷

But here, AS 15.45.110(c) does not leave alternative methods for payment available, and so there is a greater restriction on circulators more akin to the problems described by the *Meyer* court.

No evidence or argument has been presented demonstrating how the \$1 per signature limit is narrowly tailored to fit any of the State's interests.⁸⁸ Plaintiffs repeatedly argue the integrity of the initiative process is paramount. When looking at the legislative history, it appears that the goals were to address potential problems in the initiative process: signature bounty hunters paid by the sponsors of initiatives, and to bring the process back to a more grass roots effort.⁸⁹ If the goal is to avoid "bounty hunting," the restriction actually contravenes that purpose by motivating circulators to get as many signatures as possible so they can be paid more. Additionally, an organization could choose to impose rules on their circulators to get a certain number of signatures even if they were paid hourly or monthly.⁹⁰ It is

⁸⁶ *Id.*

⁸⁷ 467 F.3d 141, 143 (2d Cir. 2006) (internal citations omitted) (emphasis added).

⁸⁸ Although the State is a party in this case, it has so far not taken a position on the constitutional issue, and has not argued the state has a legitimate interest in support of AS 15.45.110(c).

⁸⁹ *Hearing on S.B. 313 before the S. Judiciary Comm., supra* note 44.

⁹⁰ In fact, Representative Grussendorf made a similar observation in 1998. "We have a suggestion as to the hourly rate, but I am concerned if you pay an hourly rate, then the person who is sponsoring or

also not persuasive enough, just as it was not for the *Meyer* Court, to argue that the purpose is to have sufficient grass roots support—given the significant effect on political speech.⁹¹

As discussed above, signatures on a petition must come from residents in at least three-fourths of the house districts in the state, a requirement that already assists in obtaining grass roots support from citizens.⁹² In fact, if a circulator traveled by plane to a village to collect signatures, it is doubtful that payment of \$1 per signature would be sufficient compensation—such circulator would truly be a volunteer regardless. Whether it was made to help garner grass roots support for initiatives, or to deter bounty hunting—the payment restriction under AS 15.45.110(c) is not narrowly tailored to accomplish those goals.

The hard limit on payment imposed under AS 15.45.110(c) poses a substantial burden on the free speech rights of petition sponsors. Because the limit is so low, circulators may be forced to effectively be volunteers.⁹³ And it seems, based on the legislative history, that the legislature truly intended to come as close to that result as possible without creating an outright unconstitutional law.⁹⁴

But legislating a cap of \$1 per signature on petition circulators is not a large enough step away from the facts underlying *Meyer* to withstand constitutional scrutiny. Perhaps if the original language allowing other forms of payment had

bankrolling a payroll as such (indiscernible) reductions and everything (indiscernible) workman's comp to other problems that come in there, or maybe even a (indiscernible) system that within an hour we expect you have X amount of petitions—or signatures. I don't know if we can get by – you know, around that way.” *Hearing on S.B. 313 before the H. Finance Comm.*, *supra* note 46 (statement of Rep. Davies).

⁹¹ See *Meyer*, 486 U.S. 414, 425 (1988).

⁹² See, e.g., AS 15.45.160(2) (requiring the lieutenant governor to determine in part whether the subscribers were residents in at least three-fourths of the house districts of the state).

⁹³ In fact, such a restricted payment would very likely lead to violation of Alaska's Wage & Hour laws, since there appears to be no exception to payment of minimum wages for petition circulators.

⁹⁴ See, e.g., *Hearing on S.B. 313 before the S. Judiciary Comm.*, *supra* note 44 (Senator Sharp wanting to keep initiatives as “grass roots” efforts while minding that a complete ban on payment was found unconstitutional). It is also worth noting that no parties have argued that the residency requirement under AS 15.45.105 is unconstitutional, despite case law indicating it might be. See, e.g., *Nader*, 531 F.3d at 1037 (holding the state of Arizona failed to meet its burden of showing that a residency requirement was narrowly tailored to further the compelling interest in preventing fraud).

remained in the bill when it was passed,⁹⁵ the statute might have withstood scrutiny. But in its current form, it does not. In this Court's view, the prohibition on payment greater than \$1 per signature under AS 15.45.110(c) is an unconstitutional restriction on free speech protected by the First Amendment to the United States Constitution.

D. Is Requiring the State to Invalidate Signatures Gathered by Circulators Paid an Amount Greater than \$1 Per Signature an Appropriate Remedy?

Regardless of the arguments over the payment statute, the heart of Plaintiffs' claim is the request for injunctive relief to prevent counting of the voters' signatures. Plaintiffs rely upon the language of AS 15.45.130 which says the lieutenant governor "may not count subscriptions on petitions *not properly certified* at the time of filing or corrected before the subscriptions are counted."⁹⁶ They suggest the meaning is clear—the State may not count signatures where petition circulator makes a false statement in the certification. The State offers an alternative reading of the statute—that its role is to assure completeness, not to determine whether the circulators have made a truthful and accurate affidavit of circulation. Fair Share, for its part, argues the Plaintiffs' proposed remedy would result in a mass disenfranchisement of the voters—a result which would again violate the First Amendment. So in this context, what is the meaning of "properly certified?"

AS 15.45.130 requires petitions to be certified by an affidavit by the circulator of the petition. The statute specifies that such affidavit must state in substance eight different points, one of them being "that the circulator has not entered into an agreement with a person or organization in violation of AS 15.45.110(c)"—the provision prohibiting payment greater than \$1 per signature. "[T]he lieutenant governor may not count subscriptions on petitions not properly certified."⁹⁷ Despite this language, the statute does not define what it means to be "properly certified."

⁹⁵ See *supra* Section II.A.

⁹⁶ AS 15.45.130.

⁹⁷ AS 15.45.130.

AS 15.80.010 contains a list of definitions applicable to the election laws including initiatives, but does not include a definition of “properly certified.”⁹⁸

As they did with the payment statute (AS 15.45.110), Plaintiffs focus upon the plain language of section 130. But rather than the words “properly certified,” Plaintiffs emphasize the penal language “may not count.” The latter words emphasize the remedy sought by Plaintiffs but do not illuminate what it means to be “properly certified” in the first instance.

The State argues the petitions were in fact “properly certified” because they were complete when filed, and the Lieutenant Governor had no duty to investigate the truth of the statements contained within them. But is this interpretation of the statute consistent with its purpose? More importantly, does a “complete” but incorrect affidavit support the remedy requested?

Other provisions of the initiative statutes suggest the focus is on verification of signatures. For example, AS 15.45.160 provides the bases for determining when a petition is *improperly filed*. That statute discusses the qualifications of the subscribers, and focuses on the number of signatures gathered. It mentions nothing about the accuracy of the circulator’s certification. Similarly, AS 15.45.150 provides a strict timeline (60 days) for the lieutenant governor to complete “review” of the petition. The State argues this short timeframe makes it entirely unrealistic to think the review process includes investigation of the circulators and the accuracy of their affidavits. Instead, the focus is on the voters who signed the petition and the need to verify each signature. This argument is not unreasonable. In the end, the statutory scheme provides no clear meaning as to when an affidavit is deficient or when a petition is not “properly certified.”

Fair Share and the State both argue that the initiative statute should be construed liberally to protect the right of the people to propose and enact laws, and

⁹⁸ At oral argument, counsel was also questioned about a definition, but no party identified a statutory or other definition.

that doubts as to technical deficiencies should be resolved in favor of that purpose. Defendants also argue that a liberal construction is proper to avoid the disenfranchisement of voters, because voters have no control and no way to know about the payment of signature gatherers.

Defendants cite to several cases for the proposition that Alaska case law supports their construction, and the idea that the Alaska Supreme Court has previously declined to invalidate the ballots of voters based on error and avoided voter disenfranchisement.⁹⁹ Defendants analogize to *Kirkpatrick*,¹⁰⁰ a case from the Supreme Court of Missouri. Although it is worth noting that *Kirkpatrick* was analyzed under a burden-shifting approach, where the proponents needed to show—and in fact did show—the validity of the signatures despite irregularities in circular affidavits.¹⁰¹ Crucial to that court's analysis was the recognition that “[t]he only statutory purpose in having a notary sign the petition to begin with is to provide a double check on the validity of the signatures of the voters. If the validity of the voters’ signatures can be otherwise verified, their signatures should not be invalidated by the notary’s negligence or deliberate misconduct.”¹⁰²

The Alaska Supreme Court has stated “the purpose of certification is to require circulators to swear to the truthfulness of their affidavits.”¹⁰³ AS 15.45.130 requires a circulator to certify eight different points before the lieutenant governor is permitted to count subscriptions (signatures) on the filed petition and determine it to be sufficient. Of course, avoiding fraud and promoting the integrity of the process are important. So to enforce the requirements, the legislature has provided for specific, criminal penalties. A circulator making a false certification is subject to perjury charges and the class B misdemeanor provision under AS 15.45.110(c).

⁹⁹ See, e.g., *Miller v. Treadwell*, 245 P.3d 867, 869 (Alaska 2010); *Willis v. Thomas*, 600 P.2d 1079, 1083 (Alaska 1979); *Fischer v. Stout*, 741 P.2d 217, 225 (Alaska 1987).

¹⁰⁰ *United Labor Comm. of Missouri v. Kirkpatrick*, 572 S.W.2d 449 (Mo. 1978).

¹⁰¹ *Id.* at 453.

¹⁰² *Id.* at 454.

¹⁰³ *N. W. Cruiseship Ass'n of Alaska*, 145 P.3d at 577.

In addition to the criminal penalties for the circulator, there are criminal penalties to a person or organization that offers or pays an improper payment to the petition circulator.¹⁰⁴ Further, even the voter signing the petition is subject to criminal penalties for signing the petition, knowing he or she is not a qualified voter.¹⁰⁵ Such voter commits the crime of Improper Subscription to Petition.¹⁰⁶ In addition to those involved in the initiative process, other participants in various phases of the electoral process are subject to criminal penalties for campaign misconduct and various forms of official misconduct.¹⁰⁷

When the Alaska voter and initiative statutes are read as a whole, it appears the overriding policy concern is to assure that only properly qualified voters sign petitions, cast ballots, and otherwise participate in the electoral process. The statutes should not be read as a trap for the unwary.

The Plaintiffs cite to certain out-of-state cases, arguing they are persuasive because they focus on preserving the integrity of the process and the purpose of providing truthful affidavits. The Supreme Court of Arizona, for example, did a survey of law in other states relating to this issue in *Brousseau v. Fitzgerald*.¹⁰⁸ That court concluded “the authorities agree that statutory circulation procedures are designed to reduce the number of erroneous signatures, guard against misrepresentations, and confirm that signatures were obtained according to law.”¹⁰⁹ It went on to state:

The only way to protect the process from fraud and falsehood is to make such conduct unprofitable. We hold that petitions containing false certifications by circulators are void, and the signatures on such petitions may not be considered in determining the sufficiency of the number of signatures to qualify for placement on the ballot.¹¹⁰

¹⁰⁴ AS 15.45.110(c) and (d).

¹⁰⁵ AS 15.56.090.

¹⁰⁶ AS 15.56.090.

¹⁰⁷ See AS 15.56.012–.199.

¹⁰⁸ *Brousseau v. Fitzgerald*, 456, 675 P.2d 713, 716 (1984).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

The Ohio Supreme Court's analysis in *Schmelzer* also drew an important distinction between a technical defect and a substantial failure to meet a statutory requirement.¹¹¹ The *Schmelzer* court noted that “mere technical irregularities” would not be enough to disturb the election process.¹¹² And the Ohio court, in a different case, invalidated an entire petition on the basis of fraud when a circulator's affidavit knowingly verified false signatures.¹¹³

But this case does not involve false signatures. In fact, there is no allegation by Plaintiffs that the signatures were false or defective in any way—only that the circulators were paid too much. Why should it make a difference whether the circulator was paid \$1 or \$2 for a signature? Does it somehow increase the likelihood that false signatures will be submitted? How is the integrity of the process improved by restricting payment to the circulator to an amount which is plainly unenticing? On the other side of the clipboard, is an Alaska voter more likely to listen to the pitchman simply because of a miniscule payment? Is the voter more likely to be persuaded to sign the petition? And for the innocent but persuaded voter, should the signature be invalidated because of an error by the circulator?

Alaskan voters should not be disenfranchised on the basis of “technical errors.”¹¹⁴ The *North West Cruiseship* case supports this Court's holding, because that Court upheld the narrowly tailored action by the Division. The Division's disqualification of a few pages that lacked the “paid by” information required by statute supported the integrity of the process while not brushing aside the rights of all the other innocent voters.¹¹⁵ But in so holding, the Court reiterated its directive that Courts should seek constructions which avoid the whole disenfranchisement of qualified electors. The Supreme Court upheld the lieutenant governor's actions because they struck the proper balance between “the people's right to legislate by

¹¹¹ See *State ex rel. Schmelzer v. Board of Elections*, 2 Ohio St.3d 1, 440 N.E.2d 801, 803 (1982).

¹¹² *Id.* at 802.

¹¹³ *State ex rel. Donofrio v. Henderson*, 4 Ohio App.2d 183, 211 N.E.2d 854 (1965).

¹¹⁴ *Miller*, 245 P.3d at 870 (quoting *Carr v. Thomas*, 586 P.2d 622, 625–26 (Alaska 1978)).

¹¹⁵ *N. W. Cruiseship Ass'n of Alaska, Inc.*, 145 P.3d at 578.

initiative and the goal of ensuring that petition subscribers are well-informed upon signing.”¹¹⁶

The Alaska Supreme Court long ago set forth the policy for interpreting laws relating to the initiative process:

In matters of initiative and referendum, we have previously recognized that the people are exercising a power reserved to them by the constitution and the laws of the state, and that the constitutional and statutory provisions under which they proceed should be liberally construed. To that end all doubts as to technical deficiencies or failure to comply with the exact letter of procedure will be resolved in favor of the accomplishment of that purpose.¹¹⁷

The right to vote by initiative is enshrined in the Alaska Constitution.¹¹⁸ Why should the people’s right to vote give way when a circulator is paid a dime more than \$1 per signature? Beyond “integrity of the process,” Plaintiffs offer little justification to interpret AS 15.45.130 to disenfranchise Alaska voters over a technical defect, especially when the statute has prescribed criminal penalties for circulators who fail to follow the law.

For these reasons, this Court holds that “properly certified” in AS 15.45.130 means the petition is “complete” and contains the proper signatures of Alaskan voters. A circulator’s affidavit under AS 15.45.130 can still be properly certified even if it contains an incorrect statement regarding the requirements for the affidavit, so long as it otherwise meets statutory requirements. This is because the integrity of the process is upheld by criminal penalty for any circulator who breaks the law.

E. Alternatively, Does AS 15.45.130 Pose an Unconstitutional Restriction on Political Speech?

Because the parties have clearly indicated an intention to seek immediate appellate review, this Court offers the following alternative holding on the

¹¹⁶ *Id.*

¹¹⁷ *Municipality of Anchorage v Frohne*, 568 P.2d 3, 8 (Alaska 1977).

¹¹⁸ See Alaska Const. art. XI, § 1.

certification statute, AS 15.45.130. Fair Share argues that Plaintiffs' interpretation of the statutory scheme "does not survive the constitutional requirement that restrictions to political speech be narrowly construed to avoid encroachment into the constitutional rights of citizens."¹¹⁹ Even assuming Plaintiffs could achieve the remedy they seek in this case to prevent the Lieutenant Governor from counting the signatures in the petition booklets at issue, this Court has grave concern for the rights of the innocent voters who would be disenfranchised by the wholesale disregard of many thousands of petition signatures simply because of a technical defect, or even misdeed by the petition circulators.

As discussed above, petition circulation is core political speech because it involves interactive communication concerning political change.¹²⁰ Exacting scrutiny has been applied when the restrictions in question significantly inhibit communication with voters about proposed political change.¹²¹ A law surpasses exacting scrutiny when it is narrowly tailored to fit a compelling state interest.¹²²

AS 15.45.130 concerns petition circulation just like AS 15.45.110(c). But the statute includes a severe penalty. Section .130 provides that the "lieutenant governor may not count subscriptions on petitions not properly certified at the time of filing." This means that AS 15.45.130 directly impacts the voters' right to engage in political speech since it requires the Lieutenant Governor to disqualify signatures when a petition is not "properly certified." Petitions must be certified by an affidavit containing at least eight different points.¹²³

¹¹⁹ Fair Share's Mot. to Dismiss at 7 (May 18, 2020).

¹²⁰ *Nader*, 531 F.3d at 1035 (quotations omitted) (citing *Meyer*, 486 U.S. at 422, 425).

¹²¹ *Buckley*, 525 U.S. at 193–94.

¹²² *Nader*, 531 F.3d at 1037.

¹²³ The affidavit must state in substance (1) that the person signing the affidavit meets the residency, age, and citizenship qualifications for circulating a petition under AS 15.45.105; (2) that the person is the only circulator of that petition; (3) that the signatures were made in the circulator's actual presence; (4) that, to the best of the circulator's knowledge, the signatures are the signatures of the persons whose names they purport to be; (5) that, to the best of the circulator's knowledge, the signatures are of persons who were qualified voters on the date of signature; (6) that the circulator has not entered into an agreement with a person or organization in violation of AS 15.45.110(c); (7) that the circulator has not violated AS 15.45.110(d) with respect to that petition; and (8) whether the circulator has received payment or agreed

The constitutional concern with AS 15.45.130 is the possibility that qualified voters will have their otherwise valid and proper political speech (their signatures) disregarded because of a knowing, or even unknowing, deficiency on an affidavit that is unrelated to the validity of the signatures. The voters who signed the petition booklets are innocent bystanders in this case, but they have constitutional rights as well. Their voices deserve to be heard, and should not be ignored simply because the circulator made a mistake. The circulator already faces the possibility of criminal action, but what redress for the innocent voter? Because Alaskan voters' right to bypass the legislature and enact laws directly is a right guaranteed by the state constitution,¹²⁴ and because it directly infringes on the First Amendment rights of the voters, the statutory remedy is subject to exacting scrutiny.

The high burden was succinctly stated in *North West Cruiseship*:

The voters who signed the . . . booklets have a right to participate in the initiative process and should not be disenfranchised because of the error of a circulator that had no impact upon them. This Court should construe the remedial portion of AS 15.45.130 only as broadly as is necessary to address the specific error. It should avoid an interpretation that requires a broader remedy that disenfranchises voters who did nothing wrong.¹²⁵

While the Alaska Constitution permits the legislature to prescribe additional procedures for the initiative process,¹²⁶ those procedures must be narrowly tailored to avoid the wholesale disenfranchisement of qualified electors.¹²⁷ The Alaska Supreme Court has consistently stated the policy is to construe statutory initiative procedures liberally and in favor of upholding proposed initiatives.¹²⁸ The Court has

to receive payment for the collection of signatures on the petition, and, if so, the name of each person or organization that has paid or agreed to pay the circulator for collection of signatures on the petition. AS 15.45.130.

¹²⁴ See Alaska Const. art. XI, § 4.

¹²⁵ *N. W. Cruiseship*, 145 P.3d at 587.

¹²⁶ Alaska Const. art. XI, § 6; see also, *Buckley*, 525 U.S. at 187 (recognizing the States have an interest in petition drives in order to ensure fairness and integrity).

¹²⁷ *Fischer*, 741 P.2d at 225.

¹²⁸ See *Boucher*, 528 P.2d at 462, overruled on other grounds by *McAlpine*, 762 P.2d 81; see also *Thomas*, 595 P.2d at 3 ("The right of initiative and referendum, sometimes referred to as direct legislation, should be liberally construed to permit exercise of that right.").

steadfastly defended the right of Alaskans to enact law through the initiative process as “an act of direct democracy guaranteed by our constitution.”¹²⁹ The goal is for people to be permitted to vote and express their will on the proposed legislation.¹³⁰

But the Court’s inquiry is not directed at the wisdom of the petition, for that decision rests with the voters.¹³¹ To pass constitutional muster, the statute is subject to exacting scrutiny, similar to AS 15.45.110(c). In this case, the remedial statute AS 15.45.130 impacts freedom of political speech by permitting otherwise valid signatures to be disregarded because of the certification requirement. Because the statute aims at political speech, Plaintiffs (or the State) must show the law is substantially related to a sufficiently important governmental interest.¹³² Stated differently, in order to survive exacting scrutiny, “the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.”¹³³

Voting is a fundamental right. In Alaska, the right to petition is a constitutionally protected right. The integrity of the initiative process must be balanced against those rights. Those who violate the initiative statutes are already subject to criminal penalties for any malfeasance. Why then is disregard of the voters’ fundamental rights to engage in the initiative process a narrowly tailored remedy? Such a remedy disenfranchises the voters who did nothing wrong.

Further, disregarding the technical violation of the payment statute (which the court already determined was unconstitutional) by the circulators will act to promote the First Amendment rights of all parties to engage in core political speech. The voters will have the final say at the ballot box if the initiative is put to them for a vote. Plaintiffs have the right to comment on the merits of the petition, just as the backers

¹²⁹ *Yute Air Alaska, Inc. v McAlpine*, 698 P.2d 1173, 1181 (Alaska 1985) (holding that courts should be reluctant to invalidate initiatives.)

¹³⁰ *Thomas*, 595 P.2d at 3.

¹³¹ *Boucher*, 528 P.2d at 463.

¹³² *Nat’l Association for Gun Rights, Inc. v. Mangan*, 933 F.3d 1102, 1112 (9th Cir. 2019); see also *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010).

¹³³ *John Doe No. 1*, 561 U.S. at 196 (citations omitted).

of Fair Share may comment on their position. By contrast, disregard of thousands of otherwise valid signatures operates like a sledgehammer on a mosquito. It may do the job, but it wreaks havoc in the process. And there is no justification for such a remedy simply because a circulator failed to meet a technical requirement, something very likely outside the knowledge of the registered voters, limiting their rights, and unrelated to the substance of the petition.

The Court, with the record before it, has not been offered persuasive information about the state interest in the legislative action (disregard of voters' signatures) outside of the interests discussed above, and that generally speaking procedures are created for initiatives to create order and preserve the integrity of the process. But such a remedy is anything but narrowly tailored. Instead, the statute disregards the rights of voters with the justification of a technical error—something that cuts deeply into the constitutional rights of Alaskans when there are other ways to ensure the veracity and integrity of the process, including the criminal penalties, as discussed above. Why should voters be disenfranchised because a circulator fails to meet technical statutory requirements?

In the Court's view, the remedy of not counting signatures contained in AS 15.45.130 is not narrowly tailored to accomplish the goals of integrity and enforcing veracity because there are other, less restrictive ways to accomplish those goals without stripping away the voters' rights. As such, the stated remedy under AS 15.45.130 is an unconstitutional restriction on the free speech rights of the disenfranchised voters.

IV. CONCLUSION

For the reasons explained herein, this Court holds:

- 1) Plaintiffs have not asserted a cause of action for which relief may be granted, and so the State Defendants' April 30, 2020 *Cross-Motion to Dismiss Pursuant to Alaska Civil Rule 12(b)(6)* is GRANTED.

2) Because the payment restriction under AS 15.45.110(c) is unconstitutional, Defendant Fair Share's May 18, 2020, *Motion to Dismiss* is GRANTED.

3) Plaintiffs' June 2, 2020 *Cross Motion for Partial Summary Judgment* is hereby DENIED.

4) Because of the Court's rulings above, Plaintiffs' July 6, 2020 *Motion for Summary Judgment* is now Moot.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 16th day of July, 2020.



Thomas A. Matthews
Superior Court Judge

I certify that on 7/16/20 a copy of this
Order was emailed to:

M. Singer / L. Baxter / M. Paton-Walsh
R. Brena / J. Wakeland

Judicial Assistant



IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

RESOURCE DEVELOPMENT COUNCIL)
FOR ALASKA, INC.; ALASKA TRUCKING)
ASSOCIATION, INC.; ALASKA MINERS)
ASSOCIATION, INC.; ASSOCIATED)
GENERAL CONTRACTORS OF ALASKA;)
ALASKA CHAMBER; and ALASKA)
SUPPORT INDUSTRY ALLIANCE,)

Plaintiffs,)

v.)

KEVIN MEYER, in his official capacity as)
Lt. Governor of the State of Alaska;)
GAIL FENUMIAL, in her capacity as Director)
Of the Alaska Division of Elections; the)
STATE OF ALASKA,)
DIVISION OF ELECTIONS;)
and VOTE YES FOR ALASKA'S FAIR)
SHARE,)

Defendants.)

Case No. 3AN-20-05901CI

FINAL JUDGMENT

This matter having come before the Court on Cross-Motions of the parties and having been advised, the Court orders judgment be entered in favor of Defendants and against the Plaintiff.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 17th day of July, 2020.



Thomas A. Matthews
Superior Court Judge

I certify that on 7/16/20 a Certified copy of this
Order was emailed to:

M. Singer / L. Baxter / M. Paton Walsh
R. Brena / J. Wakeland



Judicial Assistant

EXC 257

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